CONTRIBUTORY NEGLIGENCE AS A DEFENCE IN CONTRACT

LAW COMMISSION

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The Law Commission

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CONTRIBUTORY NEGLIGENCE AS A DEFENCE IN CONTRACT

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THE LAW COMMISSION

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(Item 1 of the Fourth Programme: the Law of Contract)

CONTRIBUTORY NEGLIGENCE AS A DEFENCE IN CONTRACT

To the Right Honourable the Lord Mackay of Clashfern,
Lord High Chancellor of Great Britain

PART I

INTRODUCTION

1.1 In this report we consider whether a plaintiff's damages should be reduced where he suffers loss as the result partly of the defendant's breach of contract and partly of his own failure to take reasonable care for the protection of himself or his interests. A simple example[1] of the type of situation with which we are concerned is that of a car owner who takes his car to a garage for a service. The garage fails to exercise reasonable skill and care in carrying out the service and thus fails to rectify a steering fault. In the course of driving the car the owner substantially exceeds the speed limit. The combination of excessive speed and the steering fault causes the car to swerve and crash causing serious damage to the car. What effect should the car owner's negligent driving have on the garage's liability?[2] We examine the law relating to contributory negligence as a defence in contract actions and make recommendations for its reform. A draft Bill to implement our recommendations appears in Appendix A.

Background

1.2 Under the law as it stands at present, a plaintiff's damages may be reduced on the grounds of his contributory negligence where the defendant is liable in tort, or where he is co-extensively liable in tort and contract, but not where he is liable only in contract. Reforms aimed at extending the availability of apportionment of the plaintiff's damages in actions in contract have been widely advocated. Calls for reform have come from the Review Committee on Banking Services Law,[3] the Auditors' Study Team on Professional Liability,[4] the Auditing Practices Board,[5] the judiciary,[6] academics,[7] and other law reform agencies (including the Scottish Law Commission).[8]

1.3 In 1990 we published a consultation paper on the law relating to contributory negligence as a defence in contract.[9] Our provisional view was that it was correct in principle for a plaintiff's damages to be apportioned where his loss resulted partly from his own conduct and partly from the defendant's breach of contract. We thought this to be particularly appropriate where the defendant was liable for breach of a contractual duty to take reasonable care, an action for the breach of which was similar in substance to an action for breach of a tortious duty of care. However, we considered that the

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[1] Other, more complex, examples are given in para. 4.15, below.

[2] The relevance of the precise terms of the contract, causation, remoteness, and mitigation are discussed in paras. 3.7 – 3.21 and 4.11 – 4.12, below.

[3] *Banking Services: Law and Practice, Report by the Review Committee* (Chairman, Professor Jack) (1989), Cm. 622, paras. 6.14 – 6.15.

[4] *Professional Liability, Report of the Study Teams* (Chairman, Professor Likierman) (1989), H.M.S.O., Report of the Auditors Study Team, para. 9.7. The broad conclusions of the report have been accepted by the Government: Hansard (H.C.), 31 October 1989, vol. 159, no. 165, written answers col. 107.

[5] *The Future Development of Auditing: A Paper to Promote Public Debate* (Nov. 1992), The Auditing Practices Board, para. 5.2.

[6] *A.B. Marintrans* v. *Comet Shipping Co. Ltd. (The Shinjitsu Maru No. 5)* [1985] 1 W.L.R. 1270, 1288 *per* Neill L.J.; *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.*, 26 November 1992, (unreported, C.A.) *per* Nolan L.J.

[7] For example, Burrows, *Remedies for Torts and Breach of Contract* (1987), p. 77; Anderson, "Contributory Negligence in Contract – Again", [1987] L.M.C.L.Q. 10; Burrows, "Contributory Negligence in Contract: Ammunition for the Law Commission", [1993] 109 L.Q.R. 175.

[8] See paras. 2.11 and 2.14 – 16, below.

[9] Contributory Negligence as a Defence in Contract (1990), Working Paper No. 114.

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principle was also applicable in relation to contractual duties which could be broken without any failure to use reasonable skill or reasonable care. We provisionally concluded that contributory negligence should be available as a defence to breaches of all contractual obligations.[10]

The consultation

1.4 Sixty individuals and organisations responded to the consultation paper. A large number came from the judiciary and from academic lawyers. Other respondents included practising barristers and solicitors, organisations representing the different parts of the legal profession, representatives of the construction, accountancy and insurance industries, commercial and industrial interests, and public and quasi-public authorities. Most respondents thought that apportionment on the grounds of the plaintiff's contributory negligence was right in principle in contractual cases, and agreed with our provisional conclusion. However, a number opposed the application of apportionment where the defendant was in breach of a strict contractual obligation, and a few opposed any extension of the availability of apportionment in contractual cases. We were impressed by the reservations expressed by the minority, and have been persuaded to depart from our provisional conclusion. Our final recommendation is that apportionment on the grounds of the plaintiff's contributory negligence should be available in actions in contract[11] where the defendant is in breach of a contractual term which imposes a duty to take reasonable care or exercise reasonable skill or both, but not where the defendant is in breach of a contractual term which imposes a higher level of duty (in the rest of this report the latter type of duty is referred to as a "strict duty").

The structure of this report

1.5 Part II of this report sets out the present law relating to contributory negligence as a defence of contract. This Part also includes a comparative survey of the legal position in some of the other common law and civil jurisdictions. Part III considers the issues arising from consultation. Our policy and recommendations for reform are contained in Part IV. Part V examines some subsidiary matters relating to our recommendations. Finally, our recommendations are summarised in Part VI.

Acknowledgments

1.6 We are grateful to all those who commented on our consultation paper. They are listed in Appendix C to this report. We are also grateful to Sir Wilfrid Bourne, K.C.B., Q.C., who prepared an analysis of the consultation. We would like to express our particular thanks to Professor P.N. Capper, Professor of Law at King's College, University of London; The Rt. Hon. Lord Justice Steyn; and Professor G.H. Treitel, Q.C., Fellow of All Souls College and Vinerian Professor of English Law at the University of Oxford who acted as a working party and advised us following consultation. We would also like to express thanks to Andrew Smith, Q.C.; Antony Edwards-Stuart, Q.C.; Marcus Smith; and John McLinden all of whom have given generously of their assistance and advice.

[10] Working Paper No. 114, para. 5.1.

[11] Actions in contract include actions for breach of an express or implied covenant in a lease.

PART II

THE PRESENT LAW

2.1 Part III of the consultation paper[1] examined in detail the law relating to contributory negligence in actions in contract. For the purposes of this report we intend to provide only a summary, although some points are developed further in our consideration of the issues arising from consultation in Part III.

Application of the Law Reform (Contributory Negligence) Act 1945 to actions in contract

2.2 The Law Reform (Contributory Negligence) Act 1945[2] was enacted to remedy the harshness of the common law rule that the plaintiff's contributory negligence, however slight, provided a complete defence to an action in tort. Section 1 provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage . . ."

"Fault" is defined in section 4 as:

> "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."

At one time it was thought that the Act could apply where the defendant was in breach of a duty of care owed only in contract.[3] Although this point has not been raised directly in the recent cases, the categorisation of contractual duties adopted by Hobhouse J. in *Forsikringsaktieselskapet Vesta* v. *Butcher* [4] and probably, therefore, his conclusion that the Act only applies to actions in contract where the defendant's liability in contact is the same as his liability in the tort of negligence independently of the existence of any contract, has been accepted by the courts.[5] Although the law might have developed so as to allow apportionment in a wider category of cases, we thus consider that it is now clear on the authorities that such development is not possible under the 1945 Act.

Conduct amounting to contributory negligence

2.3 Contributory negligence has been described as:

> ". . . a man's carelessness in looking after his own safety. He is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man, he might be hurt himself . . ."[6]

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[1] Working Paper No. 114, paras. 3.1 – 3.29.

[2] The Act is set out in full in Appendix B.

[3] *Artingstoll* v. *Hewen's Garages Ltd.* [1973] R.T.R. 197; *De Meza and Stuart* v. *Apple, Van Straten, Shena and Stone* [1974] 1 Lloyd's Rep. 508, aff'd [1975] 1 Lloyd's Rep. 498 (C.A.). See also Working Paper No. 114, paras. 3.22 – 24.

[4] (1): D's liability arises from a contractual provision which does not depend on negligence on his part; (2): D's liability arises from a contractual obligation of care which does not correspond to a tortious duty of care which would exist independently of contract; (3): D's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract: [1986] 2 All E.R. 488, 508, [1989] A.C. 852 (C.A.), aff'd [1989] A.C. 880 (H.L.).

[5] *Tennant Radiant Heat Ltd.* v. *Warrington Development Corpn.* [1988], 1 E.G.L.R 41, (C.A.); *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")* [1990] 1 Q.B. 818, 904 (C.A.), aff'd [1992] 1 A.C. 233, 266 (H.L.); *Lipkin Gorman* v. *Karpnale Ltd.* [1989] 1 W.L.R. 1340, 1360 (C.A.), aff'd [1991] 2 A.C. 548; *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] 2 Lloyd's Rep. 431, 455 – 460; *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* [1992] Ch 560, 573; *London Electricity Plc* v. *BICC Supertension Cables Ltd.*, 22 April 1993 (unreported, Judge Colyer Q.C.). See also, *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.*, 26 November 1992, (unreported, C.A.) *per* Nolan L.J. approving the *Tennant* case.

[6] *Froom* v. *Butcher* [1976] Q.B. 286 *per* Lord Denning M.R.

A plaintiff is contributorily negligent and at "fault" for the purposes of the Act if he does not take reasonable care for the protection of himself or his interests and contributes by this want of care to his own injury. He need not owe any duty to the defendant.[7]

Imputed contributory negligence

2.4 The Law Reform (Contributory Negligence) Act 1945 does not address the question whether the contributorily negligent acts of those for whom the plaintiff has responsibility may be imputed to him. Although this omission has been criticised,[8] the position is now settled and the contributorily negligent act of another person will be imputed to the plaintiff in any circumstances in which he would have been vicariously liable for that person's act had it caused damage to a third person.[9] Thus, the negligent acts of the plaintiff's employees acting in the course of their duties will be imputed to him, but not generally those of his independent contractors.[10] The position with regard to agents who are not employees is less clear. A defendant will not usually be vicariously liable for the acts of such agents, but there are several exceptions to this principle.[11] However, it has been said that these exceptions are not true exceptions because they are "dependent upon a finding that the [defendant] is, himself, in breach of some duty which he personally owes to the plaintiff".[12]

Basis for apportionment

2.5 Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 empowers the court to reduce the plaintiff's damages:

> "to such extent as [it] thinks just and equitable having regard to the [plaintiff's] share in the responsibility for the damage".

In determining responsibility the court takes into account causation and blameworthiness. However, it has discretion ultimately to apportion as it considers just and equitable.[13]

The common law position

2.6 At common law, contributory negligence is not a defence to an action for breach of contract.[14] A plaintiff's damages will, accordingly, not be reduced where his loss is the result partly of his own failure to take reasonable care for the protection of himself or his interests.[15]

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[7] Working Paper No. 114, para. 2.1.

[8] Williams, *Joint Torts and Contributory Negligence* (1951), p. 434.

[9] *Lampert* v. *Eastern National Omnibus Co. Ltd.* [1954] 1 W.L.R. 1047; *Kensington and Chelsea and Westminster Area Health Authority* v. *Wettern Composites Ltd.* [1985] 1 All E.R. 346; *A.W.A. Ltd.* v. *Daniels* (1992) 7 A.C.S.R. 759, 851 ff. See also the dictum of Lord Watson in *Mills* v. *Armstrong, The Bernina* (1888) 13 App. Cas. 1, 16; Atiyah, *Vicarious Liability in the Law of Torts* (1967), pp. 409 – 410; Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989), p. 165; Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (20th ed., 1992), p. 511; *Clerk & Lindsell on Torts* (16th ed., 1989), para. 1 – 155; Brazier, *Street on Torts* (8th ed., 1988), p. 245; Fleming, *The Law of Torts* (8th ed., 1992), pp. 287 – 8.

[10] *D. & F. Estates Ltd.* v. *Church Commissioners for England* [1989] A.C. 177, 208. See generally Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989) ch. 21. It is sometimes difficult to draw a clear line between the two. On the difficulties that may arise when ostensible authority is in issue, see *Armagas Ltd.* v. *Mundogas S.A.* [1986] A.C. 717; *First Energy (U.K.) Ltd.* v. *Hungarian International Bank Ltd.* [1993] 2 Lloyd's Rep. 194.

[11] See Atiyah, *Vicarious Liability in the Law of Torts* (1967), p. 110; Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989), pp. 579 – 81.

[12] *D. & F. Estates Ltd.* v. *Church Commissioners for England* [1989] A.C. 177, 208 citing *Clerk & Lindsell on Torts* (see now 16th ed., 1989, para. 3 – 35).

[13] Working Paper No. 114, para. 3.3; *Davies* v. *Swan Motor Co. (Swansea) Ltd.* [1949] 2 K.B. 291, 326; *Stapely* v. *Gypsum Mines Ltd.* [1953] A.C. 663, 682; *Baker* v. *Willoughby* [1970] A.C. 467, 490.

[14] *Forsikringsaktieselskapet Vesta* v. *Butcher* [1989] A.C. 852, 879; *A.S. James Pty Ltd.* v. *Duncan* [1970] V.R. 705; Treitel, *The Law of Contract* (8th ed., 1991), p. 871. See Working Paper No. 114, paras. 3.6 – 7.

[15] Unless, that is, his conduct breaks the chain of causation, renders the loss too remote or constitutes a failure to mitigate his loss: see paras. 3.8 – 3.21, below.

Comparative survey

Common law jurisdictions

2.7 The common law jurisdictions inherited the English common law rule that contributory negligence provided a complete defence to an action in tort.[16] Most jurisdictions have since made legislative provision for apportionment, but many have still not resolved whether and, if so, the extent to which, the legislation applies to actions in contract. The New Zealand Contributory Negligence Act 1947 is modelled on the English Law Reform (Contributory Negligence) Act 1945,[17] as are the statutes adopted by the jurisdictions within Australia.[18] The Canadian legislation is similar in that it applies where there has been "fault" or "negligence" on the part of the defendant.[19] However, these concepts are not further defined to specify whether they extend to actions in contract. In the United States, most States have adopted apportionment, either by legislation or by judicial intervention.[20] The legislation in the different States is by no means uniform. However, many of the statutes apply where the plaintiff seeks to recover damages for negligence, but do not go further to define the circumstances in which the defence will be available.[21]

2.8 **Concurrent liability in contract and tort:** Where there is concurrent liability in contract and tort it appears that the ambiguity of the legislation in the common law jurisdictions has caused few problems. The courts have been willing either to assume that liability for breach of a duty of reasonable care owed concurrently in tort and contract comes within the definition of "negligence" in the relevant statute,[22] or that the essence of such a concurrent action is tortious and is, therefore, within the remit of the statute.[23]

2.9 **Liability for breach of a duty of care owed only in contract:** The common law jurisdictions are less consistent when it comes to liability for breach of a contractual duty of care where there is no concurrent liability in tort. The Australian jurisdictions

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[16] See para. 2.2, above.

[17] Section 3(1) of the N.Z. Act is identical to s. 1(1) of the U.K. statute, while the definition of "fault" in s. 2 of the N.Z. Act corresponds exactly to that contained in s. 4 of its U.K. counterpart.

[18] Law Reform (Miscellaneous Provisions) Act 1965, s. 10(1) (N.S.W.); Law Reform (Tortfeasors' Contribution, Contributory Negligence and Division of Chattels) Act 1952, Pt. III. (Qld.); Wrongs Act 1936, ss. 27a (S.A.); Tortfeasors and Contributory Negligence Act 1954, s. 4 (Tas.); Wrongs Act 1958, s. 26 (Vic.); Law Reform (Miscellaneous Provisions) Ordinance 1955, Pt. V (A.C.T.); Law Reform (Miscellaneous Provisions) Ordinance 1956, Pt. V (N.T.). N.b. Western Australia's apportionment legislation is differently worded: Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947. See Fleming, *The Law of Torts* (8th ed., 1992), p. 272; Greig & Davis, *The Law of Contract* (1987), p. 1404.

[19] Contributory Negligence Act (Alberta): damage or loss caused by fault; Negligence Act (Ontario): action for damages founded upon fault or negligence; Negligence Act (British Columbia); Tortfeasors and Contributory Negligence Act (Manitoba): any action for damages founded upon the negligence of the defendant; Contributory Negligence Act (New Brunswick, Newfoundland, North West Territories, Nova Scotia, Prince Edward Island, Saskatchewan, Yukon): where by the fault of two or more persons damage or loss is caused to one or more of them.

[20] See generally Wade, "Comparative Negligence – its Development in the United States and its Present Status in Louisiana", (1979–80) 40 La. L. Rev. 299; Keeton, *Prosser and Keeton on Torts* (5th ed., 1984), p. 471.

[21] Schwartz, *Comparative Negligence* (2nd ed., 1986), p. 33.

[22] Australia: *Queen's Bridge Motors and Engineering Co. Pty. Ltd.* v. *Edwards* [1964] Tas. S.R. 93 (Tas.); *Smith* v. *Buckley* [1965] Tas. S.R. 210 (Tas.); *W. and G. Genders Pty. Ltd.* v. *Noel Searle (Tas.) Pty. Ltd.* [1977] Tas. S.R. 132 (N.C. 5) (Tas.); *MacPherson and Kelly* v. *Kevin J. Prunty and Associates* [1983] V.R. 573, at p. 581 (Vic.); *Meddick* v. *Cutten and Harvey* (1984) 36 S.A.S.R. 542 (S.A.); *Walker* v. *Hungerfords* (1987) 44 S.A.S.R. 532 (S.A.); *Bains Harding Construction & Roofing (Aust.) Pty. Ltd.* v. *McCredie Richmond & Partners Pty. Ltd.* (1988) 13 N.S.W.L.R. 437 (N.S.W.); *A.W.A. Ltd.* v. *Daniels* (1992) 7 A.C.S.R. 759 (N.S.W.). Cf. *Harper* v. *Ashtons Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395 (N.S.W.), where it was suggested, obiter, that apportionment in this situation might be avoided merely by framing the claim solely in contract. Apportionment may not be available at all in contract under the Western Australian legislation because the Western Australian statute is differently worded, *Arthur Young & Co.* v. *W.A. Chip & Pulp Co. Pty. Ltd.* [1989] W.A.R. 100, 114, 115. See also *A.W.A. Ltd.* v. *Daniels* (1992) 7 A.C.S.R. 759, 841; Canada: *Husky Oil Operation Ltd.* v. *Oster* (1978) 87 D.L.R. (3d) 86 (Sask.); *Ben Plastering Ltd.* v. *Global Dixie Ltd.* (1981) 14 R.P.R. 161 (Ont.); *Finance America Realty Ltd.* v. *Speed* (1980) 38 N.S.R. (2d) 374 (N.S.): *Noreen Energy Resources Ltd.* v. *Flint Engineering and Construction Ltd.* (1984) 51 A.R. 42 (Alta.); *Doiron* v. *Caisse Populaire D'Inkerman Ltée* (1985) 17 D.L.R. (4th) 660 (N.B.); *Coopers & Lybrand* v. *H.E. Kane Agencies Ltd.* (1985) 17 D.L.R. (4th) 695 (N.B.): New Zealand: *Rowe* v. *Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550, (rev'd on other grounds: C.A. [1982] 1 N.Z.L.R. 178); *Mouat* v. *Clark Boyce* [1992] 2 N.Z.L.R. 559, (rev'd on other grounds: [1993] 4 All E.R. 268 (P.C.)); United States: *Somma* v. *Gracey* 544 A. 2d 668 (1988) (Conn.).

[23] *Pepsi Cola Bottling Co. of Anchorage* v. *Superior Burner Service Co.* 427 P. 2d 833 (1967) (Supreme Court of Alaska). This approach leaves open the possibility that a plaintiff might try to avoid the apportionment legislation by framing his action solely in contract.

are fairly closely in step with English law in restricting apportionment in contract to cases of concurrent liability.[24] This also appears to be the orthodox view in Canada.[25]

2.10 In some of the other common law jurisdictions the courts have, however, been prepared to interpret their legislation more expansively to cover breach of a contractual duty to exercise reasonable care, even where there is no concurrent liability in tort. In New Zealand there are *dicta* which indicate that the Contributory Negligence Act 1947 would apply in such circumstances, although there has been no case directly on the point. The New Zealand Court of Appeal, in *Rowe* v. *Turner Hopkins & Partners*, stated that apportionment would be available where "negligence is an essential ingredient of the plaintiff's cause of action, whatever the source of the duty".[26] Similar flexibility has been demonstrated by the courts of British Columbia in the interpretation of the word "fault" in their legislation.[27] An alternative approach adopted by some courts in New Zealand and Canada has been to develop contributory negligence as a common law defence by analogy with the apportionment legislation.[28] The wider ambit of the law of tort in the United States has meant that cases involving liability for breach only of a contractual duty of reasonable care are rare in comparison with other jurisdictions. However, in *Sebring* v. *Colver*[29] the Supreme Court of Alaska assumed that contributory negligence was available in this type of case.

2.11 The law reform bodies in other common law jurisdictions have viewed with favour apportionment in relation to liability for breaches of duties of care owed only in contract. The New Zealand Law Commission, following in general terms the earlier recommendations of the Contracts and Commercial Law Reform Committee,[30] recommended that the Contributory Negligence Act 1947 should be replaced with new legislation which would make a reduction of damages for contributory negligence available for all breaches of contract.[31] The Alberta Institute of Law Research and Reform recommended in 1979 that the partial defence of contributory negligence should be available where there was a breach of a duty of care arising from a contract.[32] Similarly, the Canadian Uniform Contributory Fault Act adopted by the Uniform Law Conference of Canada in 1984[33] provides for apportionment "where the fault of two or more persons contributes to damages suffered by one or more of them",[34] and "fault" is defined to include, amongst other things, "a breach of duty of care arising from a contract that creates a liability for damages".[35] This policy was adopted by the Ontario Law Reform Commission in its Report on *Contribution Among Wrongdoers and Contributory*

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[24] *Belous* v. *Willetts* [1970] V.R. 45 (Vic.); *James (A.S.) Pty. Ltd.* v. *Duncan* [1970] V.R. 705 (Vic.); *Harper* v. *Ashtons Circus Pty. Ltd.* [1972] 2 N.S.W.L.R. 395 (N.S.W.); Greig & Davis, *The Law of Contract* (1987), pp. 1404, 1407; Fleming, *The Law of Torts* (8th ed., 1992), p. 282.

[25] *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976) 68 D.L.R. (3d) 385 (aff'd *sub nom. Giffels Associates Ltd.* v. *Eastern Construction Co. Ltd.* (1978) 84 D.L.R. (3d) 344) (Ont.) where the Court of Appeal interpreted the word "fault" in the contribution section of the Ontario Negligence Act to exclude breach of contract; *Husky Oil Operation Ltd.* v. *Oster* (1978) 87 D.L.R. (3d) 86 (Sask.); see Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), p. 241.

[26] [1982] 1 N.Z.L.R. 178, 181. At first instance ([1980] 2 N.Z.L.R. 550) Prichard J. stated that the Act did not apply to category (ii) duties, but the Court of Appeal, although overruling on other grounds, stressed that they were not tacitly endorsing this narrow view of the Act. See also *Mouat* v. *Clark Boyce* [1992] 2 N.Z.L.R. 559, 564, (rev'd on other grounds [1993] 4 All E.R. 268 (P.C.)).

[27] *West Coast Finance Ltd.* v. *Gunderson, Stokes, Walton & Co.* (1974) 44 D.L.R. (3d) 232 (rev'd on other grounds) (1975) 56 D.L.R. (3d) 460); *Emil Anderson Constr. Co. Ltd.* v. *Kaiser Coal Ltd.*, unreported (1972, B.C.S.C.), referred to in *Truman* v. *Sparling Real Estate Ltd.* (1977) 3 C.C.L.T. 205; *Carmichael* v. *Mayo Lumber Co. Ltd.* (1978) 85 D.L.R. (3d) 538; see the Alberta Institute of Law Research and Reform Report No. 31, *Contributory Negligence and Concurrent Wrongdoers* (April, 1979), pp. 17 – 20.

[28] New Zealand: *Day* v. *Mead* [1987] 2 N.Z.L.R. 443, 451. In *Mouat* v. *Clark Boyce* [1992] 2 N.Z.L.R. 559, 565 – 566, Cooke P. adopted a general principle of apportionment which, although based on, is not restricted by, the 1947 Act (rev'd on other grounds: [1993] 4 All E.R. 268 (P.C.)). Ontario: *Tompkins Hardware Ltd.* v. *North Western Flying Services Ltd.* (1982) 139 D.L.R. (3d) 329; *Ribic* v. *Weinstein* (1982) 140 D.L.R. (3d) 258; New Brunswick: *Doiron* v. *Caisse Populaire D'Inkerman Ltée* (1985) 17 D.L.R. (4th) 660, in which La Forest J.A. identified a common law power to apportion in contract, although the case itself concerned concurrent tortious and contractual liability.

[29] (1982) 649. P. 2d 932.

[30] *Working Paper on Contribution in Civil Cases* (June 1983).

[31] New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability* (1992), para. 191.

[32] Report No. 31, *Contributory Negligence and Concurrent Wrongdoers* (April 1979), p. 25.

[33] Uniform Law Conference of Canada, *Proceedings of the Sixty-Sixth Annual Meeting* (1984), Appendix F, *Uniform Contributory Fault Act.*

[34] Section 5(1).

[35] Section 1.

Negligence.[36] The Scottish Law Commission recommended that the defence of contributory negligence should be available to the defendant "where he is in breach of a contractual duty of care but is under no corresponding common law duty to take reasonable care".[37] Increasingly, therefore, there has been movement in the common law jurisdictions towards the application of apportionment where there is liability for breach of a duty of care owed only in contract.

2.12 **Strict contractual liability:** The common law jurisdictions do not generally permit apportionment where there is liability for breach of a strict contractual duty. This is the position in New Zealand,[38] Australia[39] and Canada,[40] although it is arguable that the interpretation of the Negligence Act adopted by the courts of British Columbia[41] is flexible enough to encompass strict contractual liability. However, in jurisdictions where the courts have been able to derive a common law power to apportion by analogy with the applicable contributory negligence legislation it may be that the restriction would not apply.[42]

2.13 In the United States, as in England, the concept of contributory negligence essentially belongs to tort, and there is authority that apportionment does not apply to strict contractual duties.[43] However, the legal position is complicated by the existence of strict tortious liability for defective products under §402A of the Second Restatement of Torts.[44] This liability is sometimes described as liability under an implied warranty, even though its basis is generally agreed to be tortious. The authorities are divided as to whether this type of liability would be subject to defence of comparative negligence.[45] The position is just as uncertain where there is a concurrent liability under an express contractual warranty. An attempt has been made, in the Uniform Comparative Fault Act 1977,[46] to resolve the issue. Section 1(a) of the 1977 Act provides for apportionment in any "action based on fault seeking to recover damages for injury or death to person or harm to property". "Fault" is defined to include breach of warranty as well as negligence or recklessness.[47] It is likely, therefore, that liability for breach of warranty would be apportioned under this Act even in the absence of §402A liability.[48] However, the framers of the Uniform Act made it clear that:

> "There is no intent to include in the coverage of the Act actions that are fully contractual in their gravamen and in which the plaintiff is suing solely because he did not recover what he contracted to receive. The restriction of coverage to physical harms to person or property excludes these claims."[49]

In any event, the U.S. courts have recognised that the apportionment principle has less justification in the commercial world where risks need to be priced and allocated in advance with certainty.[50]

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[36] (1988), p. 264, recommendation 6; s. 2(c) of the draft Bill attached to the Report.

[37] Scot. Law Com. No. 115, *Report on Civil Liability – Contribution* (December 1988), recommendation 21, para. 4.17.

[38] New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability* (1992), pp. 18 – 19.

[39] *Belous* v. *Willetts* [1970] V.R. 45 (Vic.); *James (A.S.) Pty. Ltd.* v. *Duncan* [1970] V.R. 705 (Vic.); *Read* v. *Nerey Nominees Pty. Ltd.* [1979] V.R. 47 (Vic.); *Arthur Young & Co.* v. *W.A. Chip & Pulp Co. Pty. Ltd.* [1989] W.A.R. 100 (W.A.): Greig & Davis, *The Law of Contract* (1987), p. 1404; Fleming, *The Law of Torts* (8th ed., 1992), p. 282.

[40] See Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), p. 241.

[41] See the cases cited at n. 27, above.

[42] See for example *Day* v. *Mead* [1987] 2 N.Z.L.R. 443 (New Zealand) where it was held that apportionment was possible in an action for breach of fiduciary duty.

[43] E.g. *Duff* v. *Bonner Supply Inc.* 649 P.2d 391 (1982) (Idaho Court of Appeals, breach of an implied warranty of merchantability).

[44] American Law Institute (1965).

[45] See 4 A.L.R. 3d 505 – 508 (Supplement Aug. 1993).

[46] Uniform Laws Annotated, Vol. 12 (1993 Pocket Part) p.45. This model legislation has so far been adopted by Iowa and Washington.

[47] Section 1(b).

[48] In *Karl* v. *Bryant Air Conditioning Co.* 331 N.W. 2d 456 (1982) the Supreme Court of Michigan held that similar provisions in Michigan law, althought restricted to product liability, applied to actions in contract as well as to those in tort.

[49] Comment to s.1 of the Act.

2.14 The other law reform bodies are divided as to whether apportionment should be applicable to cases of strict liability, but all have recognised the difficulties inherent in such an application. The Scottish Law Commission considered that where a party has undertaken to be bound by the contract in all circumstances, the contributory negligence of the other party should not be relevant in determining his liability under that contract.[51] It also stated that apportionment would undermine the rights of consumers in contracts for the supply of goods, and that it would introduce unacceptable uncertainty in commercial dealings.[52] It, therefore, recommended that the plea of contributory negligence should not be available as a defence to an action for breach of a strict contractual duty.[53]

2.15 The Ontario Law Reform Commission was concerned that apportionment might provide an incentive for cynical breaches of contract whereby one party appropriates an economic benefit at the expense of the other.[54] Under existing Ontario law this party would be required to pay full damages for the loss suffered by the other. It was feared that a reduction of damages on the grounds of contributory negligence would mean that the contract-breaker might profit from the breach.[55] The Commission adopted the approach of the U.S. Uniform Comparative Fault Act to breach of warranty to avoid this risk and recommended that apportionment should be available in all contractual cases where the damages being sought were for physical damage or personal injury.[56]

2.16 The New Zealand Law Commission, on the other hand, concluded that apportionment should be available in actions for breaches of all types of contractual duty. However, it was concerned about the possibility of the plaintiff being found contributorily negligent merely for failing to monitor performance or anticipate default where the defendant was in breach of an express absolute warranty.[57] It therefore recommended that the legislation should specify that the plaintiff should not be held contributorily negligent merely for acting or failing to act in justified reliance on a contract.[58]

Civil law jurisdictions

2.17 Both France and Germany have systems of apportionment for dealing with the plaintiff's fault. The German civil code provides that:

> "If any fault of the injured party has contributed to causing the damages, the obligation to compensate the injured party and the extent of the compensation to be made depends upon the circumstances, especially upon how far the injury has been caused predominantly by the one or the other party".[59]

This paragraph applies whether the action is in contract or tort.[60] Similarly, in France the liability of the defendant can be reduced where there has been *faute de la victime.* This principle applies both to tortious and contractual liability.[61]

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[50] *Bradford Trust Co. of Boston* v. *Texas American Bank – Houston* 790 F. 2d 407 (1986) (5th Circuit Court of Appeals); *United States* v. *Hibernia National Bank* 841 F. 2d 592 (1988) (5th Circuit Court of Appeals). See para. 4.6, below.

[51] Scot. Law Com. No. 115, *Report on Civil Liability – Contribution* (December 1988), para. 4.19. The Scottish Law Commission's recommendations have not yet been implemented.

[52] *Ibid.*, para. 4.20

[53] *Ibid.*, recommendation 22.

[54] Our views on this problem are set out at paras. 5.4 – 5, above.

[55] Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), p.244.

[56] *Ibid.* pp. 245 – 246, 248 and recommendation 6, p. 264.

[57] New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability* (1992), para. 193.

[58] *Ibid.*, paras. 191 – 2, s.7 draft Act. However, it has been questioned whether this provision will provide the appropriate protection for the plaintiff: Coote, "Contributory Negligence Reform and the Right to Rely on a Contract" [1992] N.Z. Recent L. Rev. 313, 320.

[59] Para. 254; see Forrester *et al., The German Civil Code* (1975).

[60] Horn, Kötz and Leser, *German Private and Commercial Law – An Introduction* (1982), p. 153.

[61] Cf. Treitel, *Remedies For Breach of Contract* (1988), p. 191; Cass.req. 7 Jan. 1929, Gaz.Pal. 1929.1.575 and Mazeaud, H., L., & J. *Traité Théorique et Pratique de la Responsabilité Civile* II; (6th ed., 1970) no. 1457.

2.18 It is often suggested that contractual liability in civil law systems (in contrast to common law systems) is based on fault. It might, therefore, be thought that the problems that we have identified in relation to apportionment in cases of strict liability[62] will be less likely to arise in civil jurisdictions. It is true that the starting point in civil law is that fault is required for a remedy in damages.[63] In German law fault must normally be shown for liability to be established for breach of a contractual obligation.[64] However, in many areas the principle of fault has been stretched to such a degree that, in effect, there is the equivalent of strict liability,[65] Similarly, French law, although nominally based on fault, makes a distinction between contractual duties to take care (*obligations de moyens*) and contractual duties to bring about a certain state of affairs (*obligations de résultat*).[66] The latter type of duty is equivalent to the common law strict duty.[67]

2.19 It is noteworthy that in France problems have been experienced with apportionment where there is strict liability in relation to road accidents. It was found that insurance companies were using the contributory negligence defence to contest cases, and that this led to delays in settlement and increases in litigation. This effectively undermined many of the advantages that the introduction of strict liability was supposed to have secured.[68] The Cour de Cassation sought to remedy the situation by declaring that apportionment was no longer applicable to road accident cases, and that the defendant could only escape full liability where he could show that the plaintiff's contributory negligence was sufficiently serious as to form a *cause étrangère*.[69] This ruling has since been affirmed and put on a statutory basis by the Law of 5 July.[70]

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[62] See paras. 3.24, 3.32, 4.2 and 4.5, below.

[63] See Treitel, *Remedies For Breach of Contract* (1988), p.8.

[64] *Bürgerliches Gesetzbuch* (the German Civil Code) para.276.

[65] Horn, Kötz and Leser, *German Private and Commercial Law - An Introduction* (1982), pp. 112 - 4.

[66] Treitel, *Remedies For Breach of Contract* (1988), p.9; Nicholas, *French Law of Contract* (2nd ed. 1992) pp. 50 - 56.

[67] The absence of fault can still exonerate a defendant to the extent that he can show that the failure in performance of an *obligation de résultat* was due to an extraneous cause (*cause étrangère*) under art. 1147, Code Civil, but this can be compared to relief from liability under the common law doctrine of frustration. The French parallel to the pre-*Taylor* v. *Caldwell* (1863) 3B. & S. 826 absolute liability of the common law is the *obligation de garantie*: Nicholas, *French Law of Contract* (2nd ed. 1992), p.56.

[68] Similar problems were experienced in Germany; Markesinis, *The German Law of Torts* (2nd ed., 1990), p.509.

[69] *Desmares,* Cass. 2ème civ. 21 juillet 1982, D. 1982, 449; see Starck, *Droit Civil - Obligations* (2nd ed., 1985), vol. 1, para. 599 - 600.

[70] Art. 3, *Loi No. 85 - 677 du 5 juillet 1985 tendant à l'amélioration de la situation des victimes d'accidents de la circulation et à l'accélération des procédures d'indemnisation,* J.O. du 6 juillet 1985.

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PART III

THE ISSUES ARISING FROM CONSULTATION

The provisional conclusion and consultation issues

3.1 Our provisional conclusion in the consultation paper was that contributory negligence should be available as a defence to breaches of all contractual obligations unless expressly or impliedly excluded by the contract.[1] The specific issues on which comment was invited were as follows:[2]

> "(i) Whether it is correct to reduce P's damages in an action for breach of contract where P is the part author of his loss.
>
> (ii) If so, whether apportionment should be introduced for all breaches of contractual obligations or only for breaches of obligations to exercise reasonable skill and care.
>
> (iii) Whether, if apportionment is introduced for breaches of contractual obligations, the ability of the court to reduce the damages awarded should take into account the nature and scope of the contractual obligation broken.
>
> (iv) Whether the proposed reform has particular implications in different contexts, for instance, banking, construction, employment, insurance and landlord and tenant, and in particular whether special provision should be made for consumer and standard form contracts.
>
> (v) Whether reform should be of the 1945 Act or otherwise."

The outcome of consultation

3.2 Most of the respondents to the consultation paper (virtually all those engaged in commerce, industry and finance, and a majority of judges and academic and practising lawyers) agreed with the provisional conclusion. In relation to the first consultation issue they thought it correct to reduce the plaintiff's damages in an action for breach of contract where he was part author of his own loss. With regard to the second issue, they thought that apportionment should be introduced for all breaches of contractual obligations. However, the support for reform was not unanimous. A minority of respondents had serious reservations about the application of apportionment to breaches of strict contractual duties, and a very small number of judges, barristers and academic lawyers opposed any extension of the availability of apportionment in contract. We set out below respondents' views on each of the consultation issues, and our reaction to them.

Issue (i): whether apportionment is correct in principle

3.3 There is some overlap between this issue and issue (ii), whether apportionment should be introduced for all breaches of contractual obligations, or only for breaches of obligations to exercise reasonable skill and care. Respondents' views on whether apportionment was right in principle necessarily influenced their opinion as to the categories of contractual obligation for which it was appropriate, and views on this question of principle varied according to whether the contractual term broken was one of reasonable care, or imposed a higher level of duty. Thus, some of the points made here are also relevant to issue (ii), and vice versa.

3.4 The view of the majority of respondents was that the present law could be unfair to either the defendant or the plaintiff and that a general, but excludable, rule of apportionment would be fairer to both. They agreed with our provisional opinion that the rules on remoteness, causation, and mitigation were not satisfactory substitutes for apportionment.[3]

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[1] Working Paper No. 114, para. 5.1.
[2] *Ibid.*, para. 5.4.
[3] *Ibid.*, paras. 4.21 – 4.26, 4.45(b).

The present legal position was regarded as uncertain, and it was said that this uncertainty led to additional cost and expenditure of court time. The point was also made that following recent decisions of the Court of Appeal and House of Lords,[4] the likelihood of a duty being found in tort where the parties' relationship was purely contractual was decreasing. Thus, the availability of apportionment on the grounds of contributory negligence in contract was becoming even more restricted.

3.5 The respondents who opposed reform thought that apportionment in contract was wrong in principle, was not necessary to avoid injustice, and would lead to insuperable difficulties. Their arguments may be summarised as follows:

1. Contractual obligations are consensual and thus of a different nature from tortious obligations. The parties to a contract have the opportunity to allocate risk in advance by the terms of their contract. A general rule of apportionment in contract would permit the courts to rewrite the parties' contract and to shift the agreed burden of risk.

2. The consultation paper had underestimated the potential of the rules of causation, remoteness and mitigation to avoid unfairness in cases where apportionment would otherwise be desirable.

3. There is no clear defect in the law of contract as there was in the law of tort before the 1945 Act was passed. The statutory apportionment remedy introduced by the 1945 Act was intended to enable a plaintiff to bring an action when he would otherwise have had no case. In contract it would be more likely to be used by the defendant (or his insurers) to reduce his liability.

4. The concept of "fault" is irrelevant to breaches of contract.

5. Such uncertainty as there is in the present law causes few problems. Reform might resolve some of these, but would do so at the cost of creating others. In addition, the present position is becoming more certain as the courts are retracting from finding concurrent liability in tort where the parties' relationship is contractual.[5]

6. The availability of a defence of contributory negligence would enhance inequalities of bargaining power. It would give economically more powerful defendants an extra means of resisting plaintiffs' claims. The likely result would be that relatively impecunious plaintiffs would be forced to settle valid claims for less than their true worth rather than face protracted, uncertain and expensive litigation on the question of apportionment.

Although these were minority arguments, they were very powerful and we took them very seriously. They are examined in detail in paragraphs 3.6 – 3.37 below. Indeed, in the case of strict contractual duties, we were persuaded to change our provisional recommendation. Our reasons are set out in paragraphs 4.2 – 4.6 below. However, as we explain in paragraphs 4.7 – 4.15 below, we were satisfied that they could be met in those cases where the defendant is liable for breach of a contractual duty of reasonable care.

1. Nature of contractual obligations

3.6 The objective approach of the law to matters of intention and assent, the increasing use of standard terms and conditions,[6] and the gradual curtailment of freedom of contract[7] by, for example, the implication of terms into contracts by law,[8] and the legislative controls on contract terms in many contexts,[9] have eroded the traditional view that the extent of the rights and obligations of the parties to a contract

[4] *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80; *Banque Keyser Ullmann S.A.* v. *Skandia (U.K.) Insurance Co.* [1990] 1 Q.B. 665, 799; *Greater Nottingham Co-operative Society Ltd.* v. *Cementation Piling & Foundations Ltd.* [1989] Q.B. 71; *Parker-Tweedale* v. *Dunbar Bank Plc* [1991] Ch. 12, 24 – 5; *Johnstone* v. *Bloomsbury Health Authority* [1992] Q.B. 333, 350 *per* Browne-Wilkinson V.C.

[5] See paras. 3.4, above and 3.27, below.

[6] This distorts the assumption that contracts are freely negotiated as the person to whom the standard conditions are offered usually has the choice only of acceptance or rejection: *Halsbury's Laws of England* (4th ed., 1974), vol. 9, para. 350.

are exclusively defined by their agreement. For example, in *Lister* v. *Romford Ice and Cold Storage Co. Ltd.*[10] Lord Radcliffe said that the contractual duty in question was "one which exists by imputation or implication of law and not by virtue of any express negotiation between the parties". It can legitimately be said that "whenever a contract is broken, the precise legal remedy available to the other party – usually an action for damages – and the kind of damages which are recoverable, are nearly always determined by legal rules, and not the intention of the parties."[11] Thus, although the intention of the parties is very important and will often be decisive in determining their respective rights and obligations (particularly in relation to negotiated commercial agreements)[12] we do not consider that a rule of apportionment is irreconcilable with the nature of contractual liability.

3.7 Nor, if the legislation is appropriately drafted, do we believe that the introduction of apportionment would permit the courts to re-write contracts and to vary agreed allocations of risk. In a contractual context the starting point for any consideration of the question whether the plaintiff has been contributorily negligent is necessarily the contract itself. If the contract allocates a risk in a particular way, the court will take that into account. Although the court may already be obliged to do this, there is a dearth of authority on the point.[13] However, so long as any reform does not allow the reallocation of risks, this point is effectively met.[14]

2. Causation, remoteness and mitigation

3.8 The criticisms of respondents to the consultation paper led us to re-examine the effect of the rules on causation, remoteness and mitigation in situations where the plaintiff contributes to his own loss. Our conclusion, however, remains that these rules are not adequate substitutes for and do not obviate the need for a rule of apportionment in contract. Before explaining why, it should be observed that there is some overlap between the three doctrines.[15]

3.9 **Causation:** A defendant is liable for breach of contract only if his breach is an operating cause of the plaintiff's loss.[16] If the plaintiff's conduct contributes to his loss, it may be held to break the chain of causation, in which event he will not be able to recover damages for that loss.[17] In assessing whether the plaintiff's conduct has broken the chain of causation the court will consider whether he acted reasonably in all the circumstances.[18] The fact that the plaintiff's conduct amounts to contributory negligence will not necessarily mean that it is unreasonable for the purposes of severing the chain of causation.[19]

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[7] See generally Atiyah, *An Introduction to the Law of Contract* (4th ed., 1989) chs. I and XVI; Mason and Gageler, "The Contract", *Essays on Contract* (ed. Finn, 1987), ch. 1; *Halsbury's Laws of England* (4th ed., 1974), vol. 9, para. 202.

[8] For example, Sale of Goods Act 1979 ss. 12 – 15; Supply of Goods and Services Act 1982 ss. 2 – 5, 7 – 10; 13 – 15. For further examples of implication by law see Treitel, *The Law of Contract* (8th ed., 1991), pp. 189 – 194; *Halsbury's Laws of England* (4th ed., 1974), vol. 9, para. 354.

[9] For instance, Unfair Contract Terms Act 1977; Sale of Goods Act 1979 s. 55; Supply of Goods and Services Act 1982 ss. 11, 16. For other statutory controls in the contexts of carriage by road, sea and air, insurance, defective premises, employment, legal services, consumer protection and fair trading see *Chitty on Contracts,* (26th ed., 1989), vol. 1, paras. 1022 – 1027. Residential and business tenancies have been subject to many such controls, for instance, Law of Property Act 1925, ss. 145, 149(6) (duration); s. 146 (restrictions on and relief against forfeiture); Housing Act 1988 (rent regulation and security of tenure); Landlord and Tenant Act 1985, ss. 8, 11, 13; Leasehold Property (Repairs) Act 1938 as amended by the Landlord and Tenant Act 1954, s. 51 (repair).

[10] [1957] A.C. 555, 587 (dissenting), approved in *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80, 107. On the objective approach, see also *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696, 728; *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A.C. 675, 696.

[11] Atiyah, *An Introduction to the Law of Contract* (4th ed., 1989), p. 12.

[12] Mason and Gageler, "The Contract", *Essays on Contract* (ed. Finn, 1987), p. 31.

[13] See Working Paper No. 114, para. 2.7. See also *H.I.T. Finance Ltd.* v. *Lewis & Tucker Ltd.* (1993) 9 Profess. Neg. 33 in which the court looked at the nature of the (non-contractual) relationship between lender and valuer in determining that the lender had not been contributorily negligent.

[14] See recommendation 7 that the court be directed to consider the nature of the contract and the mutual obligations of the parties, and recommendation 4 that the parties to a contract be able, expressly or by implication, to exclude the apportionment rule: paras. 4.29 – 30 and 4.23 – 5, below.

[15] For example, some commentators regard causation as a facet of remoteness: *McGregor on Damages* (15th ed., 1988), para. 122; Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989), p. 150; Heuston and Buckley, *Salmond & Heuston on the Law of Torts* (20th ed., 1992), p. 522. Mitigation and causation can also be difficult to distinguish: *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.,* 26 November 1992, (unreported C.A.).

3.10 In principle, where the plaintiff's conduct amounts to no more than contributory negligence and would not break the chain of causation if the 1945 Act applied, it should not break the chain of causation where the Act does not apply. The same test of causation is applicable. However, there is evidence that where the court is unable to apportion damages it is more likely to regard a contributorily negligent act by the plaintiff as a break in the chain of causation, particularly where the plaintiff's act takes place after the defendant's breach of contract.

3.11 At first instance in *Quinn* v. *Burch Bros. (Builders) Ltd.*[20] Paull J. found that the plaintiff's careless act broke the chain of causation between the defendant's breach of contract and the plaintiff's injury.[21] However, he stated that, if the action had been in tort, the chain of causation would not have been broken and damages would have been apportioned under the 1945 Act.[22] He also said that, had it not been for the 1945 Act, the chain of causation in tort would have been broken.[23] The Court of Appeal upheld Paull J.'s judgment but did not comment on the question of causation had the action been in tort.[24] In *Sole* v. *W.J. Hallt Ltd.*[25] the plaintiff's damages in tort were apportioned under the 1945 Act, but Swanwick J. held that if the claim had been pleaded in contract, the plaintiff's contibutory negligence would have amounted to a novus actus interveniens and broken the chain of causation.[26] In *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.*,[27] the defendant, in breach of contract, supplied a defective safety system for a heat sealer for use in the plaintiff's bottling line. A failure in the plaintiff's system of supervision of the line meant that although an earlier incident had put some of the plaintiff's employees on enquiry as to the existence of a defect in the safety system, the defect was not investigated and corrected. A fire ensued. It was held that the plaintiff's failure had broken the chain of causation, but Nolan L.J. indicated that had the action been decided in tort, liability would have been apportioned under the 1945 Act.[28] These cases may demonstrate merely that the test of causation in tort is different from that in contract. However, there is some doubt as to whether the test is different,[29] and we consider that they also suggest that the absence of apportionment in contract cases can lead to manipulation of the point at which the court regards the chain of causation as having been broken.

3.12 Where the court does not find that the plaintiff's contributory negligence has severed the chain of causation,[30] full damages will be awarded and no account will be taken of his failure to look after his own interests. For example, in *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")*[31] although the plaintiff bank was said to be one-third to blame for its loss, it recovered full damages.

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[16] Treitel, *The Law of Contract* (8th ed., 1991), pp. 864 – 5; *Sykes* v. *Midland Bank Executor and Trustee Co. Ltd.* [1971] 1 Q.B. 113. See also Working Paper No. 114, para. 4.11.

[17] *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [1969] 3 All E.R. 1621; *Quinn* v. *Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370; *Lambert* v. *Lewis* [1982] A.C. 225.

[18] *McKew* v. *Holland & Hannen & Cubitts (Scotland) Ltd.* [969] 3 All E.R. 1621, 1623, *per* Lord Reid; *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68, 98 – 99; *The Oropesa* [1943] P. 32, 39 *per* Lord Wright; *Quinn* v. *Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370, 376.

[19] *Sayers* v. *Harlow U.D.C.* [1958] 1 W.L.R. 623; *The Calliope* [1970] P. 172; *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd, (The "Good Luck")* [1988] 1 Lloyd's Rep. 514, 554, aff'd [1992] 1 A.C. 233; *The "Superhulls Cover" Case* [1990] 2 Lloyd's Rep. 431; *McGregor on Damages* (15th ed., 1988), para. 118.

[20] [1966] 2 Q.B. 370. See further Working Paper No. 114, para. 4.11. The case concerned breach of a contract to supply a ladder to a sub-contractor who used an unsuitable trestle as a substitute and was injured when it slipped.

[21] *Ibid.*, 377.

[22] *Ibid.*, 375.

[23] *Ibid.*, 378.

[24] *Ibid.*, 389 ff.

[25] [1973] 1 Q.B. 574.

[26] *Ibid.*, 582. This case has been criticised because it suggests that the principles of factual causation in actions in tort and conract differ: see Working Paper No. 114, para. 4.24.

[27] 26 November 1992, (unreported, C.A.).

[28] Although Nolan L.J. decided the case on the grounds of mitigation, he indicated that it mattered little whether it was approached in terms of causation or mitigation. Purchas and Scott L.JJ. held that the plaintiff's negligence had broken the chain of causation.

[29] There are indications that this may be so in *Heskell* v. *Continental Express Ltd.* [1950] 1 All E.R. 1033, 1047. Cf. Burrows, *Remedies for Torts and Breach of Contract* (1987), pp. 26, 60 – 61.

[30] The plaintiff's negligence is less likely to break the chain of causation where it precedes or is contemporaneous with the defendant's breach of contract: *McGregor on Damages* (15th ed., 1988), paras. 135, 210.

The 1945 Act was held not to apply,[32] and the plaintiff's negligence did not break the chain of causation. The rules on causation, therefore, produce an 'all or nothing' result and do not have the same capacity as apportionment to achieve an equitable result.

3.13 Causation principles were applied more flexibly in *Tennant Radiant Heat Ltd.* v. *Warrington Development Corpn.*[33] (*"Tennant"*) where the plaintiff's loss arose partly from the defendant's breach of contract and partly from the breach of a legal duty owed by the plaintiff to the defendant, that is where the plaintiff's contributorily negligent act amounted to the commission of a legally actionable wrong against the defendant. The 1945 Act did not apply as the defendant was in breach of a strict contractual obligation, but it was held that each party should recover damages from the other to the extent that the loss which it suffered was caused by the other's breach of duty. The case has been criticised on the basis that if the matter is approached as one of causation, there is no good reason to limit the scope of apportionment to cases where the plaintiff's contributory fault amounts to breach of duty to the defendant.[34] Moreover, after the doubt cast on *Tennant* by the Court of Appeal in *The Good Luck,*[35] it is likely that it will be interpreted restrictively and confined to its own facts. The injustice which may be caused by the restriction on apportioning damages for breach of contract will only be overcome by the application of the decision in *Tennant* in those cases where the plaintiff's conduct has put him in breach of an express or implied legal duty which he owes to the defendant. Where such a duty is not the product of an express contractual term,[36] the scope of this approach will depend on the court's willingness to find that the duty is to be implied into the contract.

3.14 Even where it is available, apportionment on the basis of causation is a more rigid and possibly less fair method of distributing loss than apportionment on the basis of what the court thinks just and equitable[37] within the agreed allocation of risks. The use of causation as the determinant criterion limits the court's investigation to the factual causes of an event, while excluding the relative degrees of blameworthiness which may be considered under the 1945 Act.[38] Although this investigation is more limited, it is to be doubted whether this makes the process significantly more certain.[39] Further, apportionment on the basis of causation alone can give rise to difficulties of principle. By definition, a cause is something without which the damage would not have occurred. Thus, it can be argued that it is impossible for one causal factor to have greater "causative potency"[40] than another. Each cause must be equal in responsibility,[41] at least where each is a *causa sine qua non.*[42]

3.15 These considerations lead us to three clear conclusions. First, the absence of apportionment leads to manipulation of the point at which the court regards the chain of causation as having been broken. Second, the rules of causation will, save where the plaintiff's negligent act breaches a legal duty owed to the defendant, produce an 'all or

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[31] [1988] 1 Lloyd's Rep. 514, 555, aff'd. [1992] 1 A.C. 233, 266. See also *A.B. Marintrans* v. *Comet Shipping Co. Ltd. (The Shinjitsu Maru No. 5)* [1985] 1 W.L.R. 1270, 1288-1289.

[32] Because the defendant's liability did not depend on negligence.

[33] [1988] 1 E.G.L.R. 41 (C.A.). See Working Paper No. 114, paras. 4.11, 4.25; Treitel, *The Law of Contract* (8th ed., 1991), p. 875.

[34] See Dugdale and Stanton, *Professional Negligence* (2nd ed., 1989), para. 21.23.

[35] [1990] 1 Q.B. 818, 904. See Working Paper No. 114, para. 4.25.

[36] See Working Paper No. 114, paras. 4.9, 4.21.

[37] See Working Paper No. 114, para. 4.25.

[38] *Davies* v. *Swan Motor Co. Ltd.* [1949] 2 K.B. 291, 326 *per* Denning L.J.; *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663, 682 *per* Lord Reid; *McGregor on Damages* (15th ed., 1988), para. 127.

[39] See para. 4.19, below.

[40] This term was used in *The "Marimar"* [1968] 2 Lloyd's Rep. 165, 172.

[41] In *Smith* v. *Bray* (1939) 56 T.L.R. 200 Hilbery J. found that, although it was possible to attach differing degrees of responsibility in terms of want of care to the two tortfeasors, where he had to apportion damages solely on the basis of causation he could not say that one was more a cause of the accident than the other and apportioned the damages equally. He reached the same conclusion in *Collins* v. *Hertfordshire County Council* [1947] K.B. 598, 624; See Chapman, "Apportionment of Liability between Tortfeasors", (1948) 64 L.Q.R. 26, 28; Hervey "'Responsibility' Under the Civil Liability (Contribution) Act 1978" (1979) 129 N.L.J. 509, 510.

[42] But cf. Hart and Honoré *Causation in the Law* (2nd ed., 1985), pp. 233 – 4 where the argument is put forward that causative potency can be measured in relation to the more or less dangerous character of the various causes: i.e. the more likely a particular factor is to cause the harm in normal circumstances, the greater the causative potency will be attributed to that factor.

nothing' result. Third, even in the limited circumstances where it is possible to apply the *Tennant* principle, apportionment on the basis of causation does not have the same flexibility to produce a fair result as apportionment under the 1945 Act, and it would not in our view be conducive to more certainty. We do not, therefore, regard causation as an adequate substitute for a statutory apportionment remedy.

3.16 **Remoteness:** A defendant to an action for breach of contract is liable only for such damage as was within the reasonable contemplation of the parties at the time of contracting, that is, for damage which occurred in the ordinary course of things, or damage which a reasonable man could have foreseen if he had possessed the defendant's knowledge of certain special circumstances in the particular case.[43] If an item of damage is too remote, the plaintiff will receive no compensation for it.

3.17 Although contributory negligence situations have sometimes been analysed in terms of remoteness,[44] the issue whether a plaintiff's claim for damages should fail because his negligence has contributed to his loss is better dealt with as a question of causation.[45] If, nonetheless, the remoteness test is applied, it will not produce the same result as would apportionment on the grounds of the plaintiff's contributory negligence. Subject to one qualification, it will tend to produce an all or nothing result. For example, in *Sayers* v. *Harlow U.D.C.*[46] although the plaintiff's attempt to climb out of the locked toilet cubicle in which she had become incarcerated as a result of the defendant's breach of contract constituted contributory negligence, it was within the reasonable contemplation of the parties. Thus, the damage suffered as a result was not too remote. In *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.*[47] the risk of fire was within the reasonable contemplation of the parties. Although there were failures in the plaintiff's supervisory system, the damage suffered was, therefore, not too remote. The one qualification relates to cases of loss of profits, where the actual extent of the loss of profits is too remote, but the defendant's breach of contract would, in the ordinary course of events, have caused some loss of profits. In such cases the plaintiff may recover the lower amount that was within the contemplation of the parties and to this extent remoteness may not operate in an all or nothing manner.[48] However, even in these cases the remedy will not reflect the fault of the plaintiff but the contemplation of the parties at the time they entered into the contract, and to this extent it is less likely to lead to a 'fair' result than apportionment on the basis of what the court thinks just and equitable given the agreed allocation of risks.

3.18 In conclusion, contributory negligence situations are better analysed in terms of causation than remoteness. If, in any event, the remoteness test is applied, it does not achieve the same result as would be possible under a general rule of apportionment.

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[43] *Hadley* v. *Baxendale* (1854) 9 Ex. 341, 156 E.R. 145; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528; *The Heron II* [1969] 1 A.C. 350; Treitel, *The Law of Contract* (8th ed., 1991), pp. 854 - 862.

[44] *Sayers* v. *Harlow U.D.C.* [1958] 1 W.L.R. 623; *The "Superhulls Cover" Case* [1990] 2 Lloyd's Rep. 431, 462, where Phillips J. suggests that a plaintiff's loss may not be reasonably foreseeable and therefore too remote if he negligently failed to avoid loss through ignorance of the breach.

[45] Morris L.J. in *Sayers* v. *Harlow U.D.C., ibid.,* appears to deal with the case in terms of causation: he said (p. 631) that "[t]he question in the present case is whether the injury sustained by the plaintiff resulted either entirely or partly from the defendants' breach of duty." *McGregor on Damages* (15th ed., 1988), para. 231, n. 34, treats Lord Evershed's dictum on remoteness in *Sayers* v. *Harlow U.D.C., ibid:* at 625, as an erroneous application of the rule in *Hadley* v. *Baxendale* to issues of causation. In *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")* [1992] 1 A.C. 233 it was argued by the defendant that the plaintiff's contributory negligence made his loss too remote because it would not have been within the reasonable contemplation of the parties. Lord Goff said (p. 268) that this was really a question of causation rather than remoteness.

[46] [1958] 1 W.L.R. 623.

[47] 4 June 1991, (unreported, Hobhouse J.); aff'd 26 November 1992, (unreported, C.A), *per* Nolan and Scott L.JJ.

[48] In *Cory* v. *Thames Ironworks Co.* (1868) L.R. 3 Q.B. 181 the defendant (D)'s breach of contract in supplying the plaintiff (P) with the hull of a floating boom derrick would in the ordinary course of events have caused P a loss of £420. However, unknown to D, P had intended to use the hull for an unusual purpose and suffered a loss of profits of £4,000. Although P had not suffered the smaller loss of £420, the court held D liable for that amount. See also *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528. It is not clear whether this principle would be applied to a case which did not involve loss of profits where, for example, the loss actually suffered is quite different in kind from that which would have occurred in the ordinary course of events: see Treitel, *The Law of Contract* (8th ed., 1991), p. 859.

In respect of each item of damage suffered, save in the case of loss of profits, the plaintiff is likely to receive full compensation or nothing. Even in the case of loss of profits, the remedy will not reflect the relative fault of the parties.

3.19 **Mitigation:** Whenever there is a breach of contract, the plaintiff is under a 'duty' to mitigate his loss. This means that once he is aware of the breach he must take all reasonable steps to minimise his loss and must forbear from taking unreasonable steps that increase it.[49] The plaintiff is required to act reasonably, but the standard of reasonableness is not high in view of the fact that the defendant has committed a wrong.[50] Reasonableness is a question of fact and depends on all the circumstances of the case.[51] Although most cases involving mitigation concern a deliberate act or omission on the part of the plaintiff,[52] negligent action by the plaintiff is relevant and contributory negligence can constitute a failure to mitigate.[53]

3.20 The obligation to mitigate does not, however, arise until the plaintiff has actual knowledge of his loss or of the defendant's wrongful act.[54] Thus, the plaintiff may recover in full for damage to which he contributed if his contributory act took place before he become aware of his loss or the defendant's breach of contract.

3.21 Where the plaintiff fails to mitigate his loss he cannot recover damages for that part of the loss which is caused by his failure.[55] Thus, if the plaintiff's contributory act has merely exacerbated the loss, he will recover damages for the loss which he would, in any event, have suffered.[56] Although this is more equitable than an 'all or nothing' result, it has less flexibility as a means of achieving justice than an apportionment of liability on the basis of what the court thinks is just and equitable given the agreed allocation of risks. Further, if an item of loss would not have occurred but for the plaintiff's contributory negligence, the plaintiff will receive no damages for it, even if the defendant's breach of contract contributed to it.[57] Thus, the doctrine of mitigation does not obviate the need for a rule of apportionment in contract.

3. No clear defect in the law of contract

3.22 As some respondents pointed out, at common law contributory negligence is not a defence to an action in contract and did not operate, as it did before 1945 in relation to actions in tort, to bar a plaintiff's action.[58] However, this does not mean that there is no defect in the law of contract. In situations where the plaintiff has contributed to the loss which he has suffered as a result of the defendant's breach of contract, the present law tends to award him too little or too much. Thus, as we have already seen, in circumstances where a finding of contributory negligence might have been appropriate, but the defence is not available, the court may be more likely to find that there has been a break in the chain of causation or a failure to mitigate.[59] In such cases apportionment

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[49] Treitel, *The Law of Contract* (8th ed., 1991), p. 866; *Halsbury's Laws of England,* (4th ed., 1975), vol. 12, para. 1193.

[50] *Banco de Portugal* v. *Waterlow & Sons Ltd.* [1932] A.C. 452, 506, *per* Lord Macmillan; *Pilkington* v. *Wood* [1953] Ch. 770; *Moore* v. *DER Ltd.* [1971] 1 W.L.R. 1476; *Bacon* v. *Cooper (Metals) Ltd.* [1982] 1 All E.R. 397; *McGregor on Damages* (15th ed., 1988), para. 311.

[51] *Payzu Ltd.* v. *Saunders* [1919] 2 K.B. 581, 588, *per* Bankes L.J.; *Moore* v. *DER Ltd.* [1971] 1 W.L.R. 1476; *The "Solholt"* [1983] 1 Lloyd's Rep. 605, 608.

[52] See, for instance, *Payzu Ltd.* v. *Saunders* [1919] 2 K.B. 581, *The "Solholt"* [1983] 1 Lloyd's Rep. 605.

[53] *Jones* v. *Watney, Combe, Reid and Co. (Ltd.)* (1912) 28 T.L.R. 399, 400; cf. *The "Superhulls Cover" Case* [1990] 2 Lloyd's Rep. 431, 461, 462.

[54] *Eley* v. *Bedford* [1972] 1 Q.B. 155, 158 *per* MacKenna J.; *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] 2 Lloyd's Rep. 431, 462; *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.,* 26 November 1992, (unreported, C.A.) *per* Scott L.J. Cf. Hobhouse J. at first instance (4 June 1991, unreported) and Nolan L.J. in the Court of Appeal who said that knowledge of the facts that constitute the breach is enough: the plaintiff does not have to be aware that those facts actually constitute an actionable breach. Cf. also *Chitty on Contracts, General Principles* (26th ed., 1989), para. 1820.

[55] Treitel, *The Law of Contract* (8th ed., 1991) pp. 866 - 869; Working Paper No. 114, para. 4.22.

[56] See, for example, *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.,* 4 June 1991, (unreported, Hobhouse J.) where although no damages were awarded for the fire damage caused by the defective safety system, damages were awarded for the cost of bringing the defective system up to specification and also for the loss of profit that this would have entailed, aff'd. C.A., 26 November 1992, (unreported).

[57] For instance, *Toepfer* v. *Warinco A.G.* [1978] 2 Lloyd's Rep. 569; *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.,* 26 November 1992, (unreported, C.A.).

[58] See para. 2.6, above.

[59] For example, *Quinn* v. *Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370; *Lambert* v. *Lewis* [1982] A.C. 255; *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.,* 26 November 1992, (unreported, C.A.). See paras. 3.9 - 15 and 3.19 - 21, above.

would produce a more equitable result. In other cases, where the plaintiff would at present recover in full despite his contribution to his loss, apportionment would permit the defendant to reduce his liability. Again, this would produce a fair result, particularly where the defendant has agreed only to exercise reasonable skill and care. It cannot be assumed in such cases that he has undertaken to compensate the plaintiff fully, even where the plaintiff is part author of his own loss.[60]

4. Is "fault" relevant in contract?

3.23 We disagree that the concept of "fault" is irrelevant to all breaches of contract. Liability for breach of a contractual duty to exercise reasonable skill and care is clearly based on fault.[61] The defendant does not guarantee a particular outcome and he can only be liable if he fails to exercise the necessary degree of care.[62] If it is in the nature of the contract that fault is relevant to the defendant's liability, we consider that contributory fault on the part of the plaintiff should also be relevant.[63] In such circumstances, where the plantiff is also at fault, the respective faults of defendant and plantiff are of the same kind (failure to take proper care) and differ only in degree. Thus, there should be no difficulty in comparing their blameworthiness for the purpose of assessing their respective degrees of responsibility.[64]

3.24 However, where the defendant is in breach of a strict contractual duty, for example, an obligation to pay money,[65] to deliver generic goods,[66] or to supply goods of the quality expressly or impliedly required by the contract,[67] fault is irrelevant to his liability.[68] Lord Edmund-Davies has said that "in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligation, and certainly no defence to plead that he had done his best."[69] Thus, where the defendant is in breach of a strict contractual duty, fault is immaterial, and it would be difficult and inappropriate to compare his blameworthiness with that of the plaintiff.[70] Apportionment is permitted in cases of "strict"[71] liability under Part I of the Consumer Protection Act 1987.[72] This Act recognises the difficulty of balancing blameworthy against non-blameworthy conduct, and accordingly deems the defect to be the fault of the person who is strictly liable for it under the Act.[73] However, this formula does not completely solve the problem. It does not specify the quantum or nature of the defendant's deemed fault, so it remains difficult to weigh it against the fault of the plaintiff.

3.25 Furthermore, the analogy drawn with strict liability in tort is not wholly accurate. Where the common law unilaterally imposes liability in tort upon a defendant who has not been at fault, it is reasonable in balancing the interests of defendant and plaintiff to expect the plaintiff to take some precautions for his own safety. However, in

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[60] Working Paper No. 114, para. 4.38.

[61] For full discussion see Treitel, "Fault in the Common Law of Contract" in Bos and Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (1987), p.185, 198, and the same author's *The Law of Contract* (8th ed., 1991), p.739, and *Remedies for Breach of Contract* (1988), pp. 25, 28. See also Working Paper No. 114, para. 3.17.

[62] For example, *Thake* v. *Maurice* [1986] Q.B. 644; *Eyre* v. *Measday* [1986] 1 All E.R. 488. See also Working Paper No. 114, para. 4.27.

[63] See also Scot. Law Com. C.M. No. 73, *Civil Liability – Contribution* (November 1986), para. 5.40; Scot. Law Com. No. 115, *Report on Civil Liability – Contribution* (December 1988), para. 4.17.

[64] See paras. 3.33 and 4.8, below.

[65] For example, *Universal Corpn. v Five Ways Properties Ltd.* [1979] 1 All E.R. 552, 554; *Congimex S.A.R.L. (Lisbon)* v. *Continental Grain Export Corpn.* [1979] 2 Lloyd's Rep. 346.

[66] For example, *Barnett* v. *Javeri & Co.* [1916] 2 K.B. 390; *Van Der Zijden Wildhandel N.V.* v. *Tucker & Cross Ltd.* [1975] 2 Lloyd's Rep. 240; *Intertradex S.A.* v. *Lesieur-Tourteaux S.A.R.L.* [1978] 2 Lloyd's Rep. 509.

[67] For example, *Frost* v. *Aylesbury Dairy Co.* [1905] 1 K.B. 608; *Daniels* v. *White & Sons Ltd.* [1938] 4 All E.R. 258.

[68] See generally, Treitel, "Fault in the Common Law of Contract" in Bos and Brownlie, *Liber Amicorum for Lord Wilberforce* (1987), p.185, and the same author's *Remedies for Breach of Contract* (1988), ch. II, and *The Law of Contract* (8th ed., 1991), p.737 – 9, Working Paper No. 114, paras. 3.15 – 16.

[69] *Raineri* v. *Miles* [1981] A.C. 1050, 1086.

[70] Even if the defendant deliberately or negligently breached the strict duty, as his blameworthiness would be irrelevant to his liability, it would be inappropriate to consider it. Also, any consideration of the quality of the defendant's conduct would add to the issues to be determined and increase uncertainty: see para. 3.30, below.

[71] There is some dispute as to whether the Consumer Protection Act imposes true strict liability: see para. 3.40, point 5, below.

[72] S. 6(4).

[73] See Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989), p. 259.

the paradigm case in contract the defendant has voluntarily assumed liability without fault by means of a specific contractual arrangement with the plaintiff.[74] Thus, the parties will have had the opportunity to allocate risk in the contract. They could have agreed that the defendant's liability should be reduced in the event of the plaintiff's contributory negligence. If they do not do so, and the defendant contracts to produce a particular result without any limitations on his liability,[75] provided that the plaintiff's conduct is not so extreme as to break the chain of causation, or so extraordinary as to take it outside the reasonable contemplation of the parties, or as to constitute failure to mitigate, it is not unreasonable for the defendant to be fully liable for breaching his undertaking.

5. Uncertainty

3.26 **The present position:** There seem to us to be two areas of potential uncertainty in the present law. The first relates to the problem of placing a particular case in one or other of Hobhouse J.'s three categories.[76] The second concerns the availability of apportionment in relation to each category.

3.27 As to the first, it is not always clear whether there is co-extensive liability in contract and tort, or liability only for breach of a contractual duty of care. This is because the dividing line between the two categories changes as the scope and content of the duty of care in tort changes.[77] An example of this arises out of the recent contraction of the scope of negligence as a cause of action.[78] In many situations, in particular in those involving economic loss, it has become difficult to predict whether a defendant owes a tortious duty of care to a plaintiff with whom he contracts.[79] As apportionment is only available in contract if there is co-extensive liability in tort, uncertainty as to whether there is liability in tort leads to uncertainty as to the availability of apportionment. There has been a retreat from the assimilation of contractual and tortious liability,[80] which led some respondents to argue that category (3) will soon be of little significance. However, concurrent liability still arises in many situations,[81] including dealings between professional person and client, carrier and passenger, employer and employee, bailor and bailee, and occupier of premises and visitor.[82] Even if it became clear that there was no longer liability in tort in a particular situation, for example, if it were held, as it once was,[83] that professional people in contractual relationships with their clients were liable only in contract, the shift in the basis of liability would not produce a change in the practical effect of the plaintiff's contributory negligence. Apportionment would still be desirable.

3.28 With regard to the second area of potential uncertainty, the position with regard to the availability of apportionment under the 1945 Act is clear in those cases where the defendant's liability in contract is the same as his liability in tort,[84] and where the defendant is in breach of a strict contractual duty, but there is no duty in tort.[85] In the former instance it is available and in the latter it is not. As explained in paragraph 2.2, we believe that it is also now clear that apportionment is not available where the defendant is in breach of a duty of care which arises only in contract.

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[74] Scot. Law. Com. No. 115, *Report on Civil Liability – Contribution* (December 1988), para. 4.28. See also Working Paper No. 114, para. 4.28, n.56. For the different position where statute imposes liability without fault on the defendant see para. 3.40, points 3 and 5, below.

[75] Cf. if the defendant merely promises to exercise reasonable care to secure a result.

[76] See para. 2.2, n. 4, above, and para. 3.38, below.

[77] Working Paper No. 114, para. 4.29(i).

[78] For example, *Caparo Industries Plc.* v. *Dickman* [1990] 2 A.C. 605; *Murphy* v. *Brentwood District Council* [1991] 1 A.C. 398.

[79] See *Jackson & Powell on Professional Negligence* (3rd ed., 1992), para. 1-42.

[80] See para. 3.4, n. 4, above.

[81] See generally Fleming, *The Law of Torts* (8th ed., 1992), pp. 186 - 8.

[82] Treitel, *The Law of Contract* (8th ed., 1991), pp. 872 – 3; *Jackson & Powell on Professional Negligence* (3rd ed., 1992), paras, 1-50 – 1-57.

[83] For instance, at one time solicitors owed their clients only a contractual duty: *Groom* v. *Cocker* [1939] 1 K.B. 194. See Kaye, "The Liability of Solicitors in Tort", (1984) 100 L.Q.R. 680.

[84] *Forsikringsaktieselskapet Vesta* v. *Butcher* [1986] 2 All E.R. 488, [1989] A.C. 852 (C.A.), aff'd [1989] A.C. 880 (H.L.); *Lipkin Gorman* v. *Karpnale Ltd.* [1989] 1 W.L.R. 1340, 1360 (C.A.) (this point was not raised in the House of Lords [1991] A.C. 548); *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] 2 Lloyd's Rep. 431; *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* [1992] Ch. 560.

[85] *Forsikringsaktieselskapet Vesta* v. *Butcher* [1986] 2 All E.R. 488, [1989] A.C. 852 (C.A.), aff'd [1989] A.C. 880 (H.L.); *Tennant Radiant Heat Ltd.* v. *Warrington Development Corpn.* [1988] 1 E.G.L.R. 41, *London Electricity Plc* v. *BICC Supertension Cables Ltd.* 22 April 1993, (unreported, Judge Colyer Q.C.).

3.29 This leaves only the situation where the defendant is in breach of both a strict contractual duty and a tortious duty which is not co-extensive with the contractual duty. Here it is reasonably certain that the plaintiff may enforce the strict duty without any reduction of damages in respect of his contributory negligence. In *Vacwell Engineering Co. Ltd.* v. *B.D.H. Chemicals Ltd.*[86] Rees J. appeared to assume that contributory negligence on the part of the plaintiff would be relevant where the defendant was in breach of the strict condition of fitness for purpose[87] and of a tortious duty to take reasonable care. However, this is not a strong authority since he found that the plaintiff had not been negligent and he did not, therefore, have to consider the application of the 1945 Act. Moreover, in the more recent case of *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")*[88] it was held that the plaintiff could recover full damages where the defendant was in breach of a strict contractual duty notwithstanding that he was also in breach of a contractual duty of care concurrent with a tortious duty of care. The same principles should apply where there is a breach of a strict contractual duty and contemporaneous liability solely in tort. In this situation the 1945 Act will not apply to the action for breach of contract. The defendant's breach of contract is not a "fault" for the purposes of the Act as it does not give rise to a liability in tort.[89] The fact that the defendant is also in breach of a tortious duty means that the plaintiff has a choice of remedies. He is free to pursue whichever is most favourable to him.

3.30 **The effect of reform:** In our view, the introduction of apportionment in contract would produce two elements of uncertainty, one as to what constitutes contributory negligence in a contractual context, and the second as to the quantum of the reduction in the plaintiff's damages to reflect his contribution to his loss. With regard to the first, a degree of uncertainty is the natural product of any reform. We believe, however, that in time the position will settle down. We do not consider that the availability of a defence of contributory negligence would necessarily increase uncertainty since, under the present law, in the factual circumstances in which contributory negligence would be a live issue, questions of causation, remoteness, and mitigation are never likely to be clear cut.[90] However, we accept that allegations of contributory negligence[91] would add to the issues which have to be determined, and to the difficulty in settling cases, in those cases at either end of the spectrum where the plaintiff's contributory conduct is either minor or quite substantial, in which at present he will gain all or nothing. This would be a particular problem if the defence was available in cases involving breach of a strict duty where at present there is no need to investigate the quality of the defendant's conduct because fault is irrelevant to his liability.[92] However, where the defendant is liable for breach of a contractual duty of reasonable care it is already necessary for the court to consider the quality of his conduct, and we do not envisage any significant increase in uncertainty.

3.31 Turning to the second element of uncertainty, if the court is able to apportion damages on the basis of what it considers to be just and equitable, it may be difficult to predict the outcome of a breach of contract case where the plaintiff has been contributorily negligent. One respondent suggested that the availability of apportionment would give birth to a large number of contested cases where the issue between the parties was not the admitted breach by the defendant, the predominantly guilty party, but the contribution payable by the plaintiff, the predominantly innocent party. Although, in time, the results of cases would become more predictable, the wide discretion given to the court and the wide variety of contractual situations would make it difficult to achieve the sort of certainty many respondents thought desirable in contract. Two respondents commented that apportionment is rarely provided for in commercial contracts because the parties in commerce rarely desire the uncertainties of an apportionment remedy.

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[86] [1971] 1 Q.B. 88.

[87] Under s. 14(1) of the Sale of Goods Act 1893.

[88] [1988] 1 Lloyd's Rep. 514, 555, aff'd H.L. [1992] 1 A.C. 233, 266. See Working Paper No. 114, n. 89.

[89] See Working Paper No. 114, para. 3.2(1).

[90] This may even be so in cases of strict liability: for example, *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.*, November 26 1992, (unreported, C.A.).

[91] Made by the defendant in an attempt to reduce his liability, or by the plaintiff in order to gain something rather than nothing.

[92] See para. 3.24, above.

3.32 We consider that this problem would be particularly acute in cases in which the defendant was in breach of a strict contractual duty. As we have explained in paragraph 3.24 above, it would be difficult in such cases to balance the relative blameworthiness of plaintiff and defendant where fault is irrelevant to the defendant's liability.

3.33 There will be much less uncertainty, however, where the contractual duty which has been breached is a duty to take reasonable care. First, the fault of the defendant is of the same kind, and can thus easily be balanced against that of the plaintiff.[93] Second, it is already possible to apportion damages for breach of a contractual duty of care which is concurrent with a tortious duty of care, and this exercise does not appear to have given rise to particular difficulty in practice. There are no material distinctions so far as the basis for apportionment is concerned, between those cases which involve the breach only of a contractual duty of reasonable care. Third, the argument that it is unfair that a plaintiff who has 'negligently' contributed to his loss may be able to recover full damages is more pertinent where the defendant is subject only to a duty of reasonable care. This is because, unlike a strict duty, the nature of a duty of care does not guarantee a particular result. An agreement to take reasonable care is not necessarily[94] an undertaking to compensate the plaintiff fully even where he has contributed to his loss.[95] Thus, although the uncertainty inherent in reform may be a serious obstacle in the way of the introduction of apportionment where there is liability for breach of a contractual duty which does not depend on negligence on the defendant's part, we consider that it is not nearly such a significant obstacle where the contractual duty which is breached is a duty of reasonable care.

3.34 **Conclusion:** In some cases at present there is uncertainty as to whether there is concurrent liability in contract and tort (in which event apportionment is available), or liability only in contract (in which case it is not). No respondent suggested that this uncertainty caused problems in practice.[96] However, there has been a number of cases[97] concerning the application of the 1945 Act to actions in contract over recent years, and this tends to show that uncertainty as to the availability of apportionment is likely to lead to disputes. We consider it desirable to resolve this uncertainty. Reform would solve this problem, and it would not, in our view, significantly increase uncertainty where the defendant is liable for breach of a contractual duty of reasonable care. However, where the defendant is in breach of a strict contractual obligation we consider that issues as to the quality of the defendant's conduct and the appropriate reduction in damages would result in greater overall uncertainty to an extent that would be undesirable.

6. Inequalities of bargaining power

3.35 The introduction of apportionment in contract on the grounds of the plaintiff's contributory negligence could, in our opinion, have undesirable consequences for plaintiffs in situations where the defendant is the financially stronger party. It would give such a defendant another potential weapon with which to resist the plaintiff's claim and drag the case out until the plaintiff had neither the resources nor the energy to pursue it further. As a result, it would further tip the scales of the balance of power in the defendant's favour. Although no respondent to the consultation paper suggested that the availability of apportionment where there is concurrent liability in contract and tort gave rise to this problem, this may be because none of the recent cases involved inequalities of bargaining power, and every respondent thought that apportionment should be retained in such cases to avoid placing too much emphasis on the form of action.[98]

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[93] See further paras. 3.23, above and 4.8, below.

[94] Much will depend on the experience of the plaintiff – where he is a lay person, the defendant may be expected to take the risk of his contributory negligence. The court will, in any event, take the plaintiff's expertise into account in determining whether he has been contributorily negligent: see paras. 3.46 and 4.12, below.

[95] See para. 3.22, above.

[96] It should be borne in mind, however, that the consultation paper did not ask whether respondents had experienced problems. See also the arguments in *Barclays Bank Plc* v. *Fairclough Building Ltd.*, 13 May 1993, (unreported, Judge Havery Q.C.).

[97] *Tennant Radiant Heat Ltd* v. *Warrington Development Corpn.* [1988] 1 E.G.L.R. 41 (C.A.); *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")* [1990] 1 Q.B. 818, 904 (C.A.), aff'd [1992] 1 A.C. 233, 266 (H.L.); *Lipkin Gorman* v. *Karpnale Ltd.* [1989] 1 W.L.R. 1340, 1360 (C.A.), aff'd [1991] 2 A.C. 548 (H.L.); *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] 2 Lloyd's Rep. 431, 455 – 460; *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* [1992] Ch. 560, 573.

[98] See para. 3.42, below.

3.36 We consider that the enhancement of inequalities of bargaining power would be a particular problem in consumer contracts.[99] We expressed the view in the consultation paper[100] that consumers were unlikely to be prejudiced since it will often be reasonable for them to rely on the defendant to perform his obligations[101] and damages will only be reduced to the extent the court thinks just and equitable. However, most cases settle before reaching court, and these safeguards will not prevent defendants from raising unmeritorious defences as a means of forcing impecunious plaintiffs to settle for less than their full claim is worth. We said in our report on *Sale and Supply of Goods*:[102]

> "Given that the overwhelming majority of consumer disputes are not taken to court, or even to lawyers, the relative strength of the bargaining position of each party is, in our view, a factor of critical importance."[103]

and

> "Sometimes, . . . what the law is believed to be is more important than what it is. There should be no ambiguity or misunderstanding about the rights of the consumer buyer."[104]

3.37 We found this point particularly difficult to resolve. It led us to have serious reservations about recommending apportionment for cases involving breach of a strict contractual duty. However, we decided in the end that the problem would be less acute where the defendant was in breach of a duty of reasonable care. The reason for this is that the defendant can only undermine the plantiff's position by raising an unmeritorious defence if the legal position is sufficiently uncertain. If the plaintiff is reasonably sure of his rights he is in a better position to stand up for them. As we have seen,[105] the defence of contributory negligence will only give rise to substantial uncertainty in relation to strict contractual duties. We concluded, therefore, that this point was not an insurmountable obstacle to reform provided that reform was restricted to contractual duties of reasonable care.

Issue (ii): whether apportionment should be introduced for all contractual obligations, or only those of reasonable care

3.38 As explained in paragraph 3.3 above, it is difficult to isolate points arising from issue (i) from those arising from issue (ii). Thus, much of what we have said in the previous section relates also to issue (ii).[106] Respondents were divided in their views on issue (ii). Although most agreed with our provisional conclusion that apportionment should, as a general rule, apply to all contractual relationships, a number opposed the application of apportionment where the defendant is in breach of a strict contractual obligation. The minority of respondents who did not favour reform at all, were nonetheless prepared (albeit reluctantly) to accept the present law whereby apportionment is applied where the defendant's liability in contract is the same as his liability in the tort of negligence. In the discussion which follows we explore the arguments which influenced respondents in relation to each category of contractual obligation. Although they are not watertight,[107] we use the categories set out by Hobhouse J. in *Forsikringsaktieselskapet Vesta* v. *Butcher*[108] because they are useful for the purposes of analysis. They are as follows: "(1) Where the defendant's liability arises

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[99] Some respondents noted that as there will be no necessity to make contractual provision for apportionment, consumers will lose the protection afforded to them at present by the Unfair Contract Terms Act 1977 and in the future by the E.C. Directive on Unfair Terms in Consumer Contracts, Council Directive 93/13/EEC (OJ L95, 21.4.93, p. 29) (see paras. 4.25 and 5.17, below) in the event that the defendant should impose a contractual term providing for apportionment. But cf. paras. 4.24 – 25 below.

[100] Working Paper No. 114, para. 4.32(ii).

[101] See also paras. 4.11 – 13, below.

[102] *Sale and Supply of Goods* (1987) Law Com. No. 106; Scot. Law Com. No. 104; Cmnd. 137.

[103] *Ibid.*, para 4.4.

[104] *Ibid.*, para. 4.14.

[105] Paras. 3.30 – 34, above.

[106] See paras. 3.23 – 25 and 3.30 – 37, above.

[107] See Working Paper No. 114, paras. 3.12 – 14.

[108] [1986] 2 All E.R. 488.

from some contractual provision which does not depend on negligence on the part of the defendant. (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract. (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract."[109]

Category (1) – The defendant's liability arises from a contractual provision which does not depend on negligence on his part

3.39 Respondents' main arguments in favour of extending apportionment to this category were, first, that there was no logical reason for distinguishing it from categories (2) and (3) and second, that apportionment in cases of strict liability was already accepted in tort. As we explain in Part IV of this report,[110] we believe that there is an argument of principle for distinguishing the two categories. Nor, for the reasons set out in paragraphs 3.25 and 3.40 (5), were we convinced by the second proposition.

3.40 The main arguments given by respondents against extending apportionment to category (1), and our comments on them were as follows:

1. It was said that in many contracts the burden of risk undertaken by the various parties is carefully worked out and deliberately assumed on the basis of detailed provisions, often embodied in 'standard form contracts'. A general rule of apportionment would distort the incidence of that agreed burden. As we explain in paragraph 3.7, we do not consider that this is an insuperable problem. It can be overcome by drafting the legislation appropriately.

2. Apportionment was thought to have the effect of introducing an element of uncertainty into a situation where otherwise there would be little doubt about the extent of the defendant's liability. It was said that, as a general rule, cases in which the defendant is subject to a strict obligation involve much less factual investigation than do cases in which liability depends on fault.[111] If contributory negligence was admitted as a defence in such cases, it was suggested that the result would be lengthy investigations, difficulties in achieving settlement of claims, and protracted trials. The problems about unequal bargaining power discussed in paragraphs 3.35 – 37 were also mentioned. For the reasons given in paragraphs 3.30 – 34, this point seems to us to have merit.

3. Apportionment was alleged to be inconsistent with legal and social policy in those fields (notably sale of goods) where Parliament has imposed on the defendant a strict obligation in order to compel him to observe high standards and protect consumers and other potentially vulnerable contractors against his larger purse and their own negligence. We thought this point important. In our joint report on *Sale and Supply of Goods* we considered the policy which should operate in the consumer field. We concluded that:[112]

> "[t]he primary task of the law in this situation (and the law is hardly ever directly invoked) is to provide a regime against which potential disputes can be most satisfactorily resolved. And in this resolution the generally weak bargaining position of the buyer is an essential consideration: this is the very basis of modern consumer law. . . for the consumer transaction, the regime which applies must be a simple one . . . There should be no ambiguity or misunderstanding about the rights of the consumer buyer."
>
> The introduction of apportionment and considerations of fault into situations where there is strict liability would seem to us to undermine the simple regime which exists at present and which Parliament has decreed necessary to protect consumers and other economically weak plaintiffs. We therefore acknowledge the force of this point.

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[109] *Ibid.*, 508.
[110] See paras. 4.2 - 4, below.
[111] See para. 3.30, above.
[112] (1987) Law Com. No. 160; Scot Law Com. No. 32; Cmnd. 137, para. 4.14.

4. It was suggested that there was no demand for apportionment in category (1) cases. This was confirmed by the results of consultation generally, although, as we have indicated,[113] a majority of respondents thought that apportionment was right in principle in contractual cases.

5. The concept of fault was said to be irrelevant where there is strict contractual liability. The analogy with section 6 of the Consumer Protection Act 1987 was thought to be not wholly convincing because there, although liability is strict, it is, in substance, fault based. As explained in paragraph 3.24 above, we agree that the concept of fault is irrelevant where there is strict liability. We also consider that the "strict" liability that is imposed by the Consumer Protection Act differs from strict liability in contract because it is modified by the defence in section 4(1)(e) that:

> "the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control".

This could operate where there is a production flaw but all practicable quality control measures are taken. If it does, the protection under the Act will be reduced from strict liability to the level of liability for negligence, but with a reversed burden of proof.[114] This can be contrasted with liability for breach of the implied contractual term of fitness for purpose (originally a common law implication, now codified in the Sale of Goods Act 1979) in relation to which it is not a defence to show that:

> "[i]n the state of knowledge, scientific and commercial, no deliberate exercise of human skill or judgment could have prevented [the fault]".[115]

In any event, we do not consider that the fact that apportionment was considered appropriate under the Consumer Protection Act regime justifies its extension to areas of contract law where Parliament, both at the time it codified the common law and in subsequent sale of goods legislation, has decided that the consumer interest requires certainty and the exclusion of considerations of fault and has imposed a strict obligation on the defendant. Although this argument does not apply where one of the parties to a contract voluntarily assumes a strict obligation, we have already dealt with that situation in paragraph 3.25, above.

Category (2) - The defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract

3.41 A large majority of consultees favoured the introduction of apportionment in category (2) cases.[116] It was suggested that it was illogical to allow apportionment in category (3) cases but not in category (2) cases, since both concern contractual duties of care. This state of affairs would risk the courts being astute to find a duty in tort in order to avoid injustice.[117] The view was expressed that a plaintiff's failure to look after his own interests was a logical counterpart to the defendant's failure to take proper care of those interests. For example, if the plaintiff failed adequately to explain the particular problem which he had experienced with his car when taking it to be serviced, the defendant could not do his job properly. We agree with these points. The respondents who opposed the extension of apportionment to category (2) were influenced by the reasons set out in paragraph 3.5 of this report. We have already considered these objections and have concluded that they are not persuasive in relation to contractual duties of reasonable care.[118]

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[113] See paras. 3.2, 3.4 and 3.38, above.

[114] Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989), p. 258; *Benjamin's Sale of Goods* (4th ed., 1992), para. 14–040.

[115] *Ashington Piggeries Ltd.* v. *Christopher Hill Ltd.* [1972] A.C. 441, 498. See also *Benjamin's Sale of Goods* (4th ed., 1992) para. 14-008.

[116] All those who supported the general principle favoured apportionment in category (2) cases.

[117] One respondent suggested that although this is less likely in the current judicial climate, the history of the ebb and flow of the ambit of tort means that it is dangerous to rest any doctrine on the current anti-tort trend.

[118] Paras. 3.6 - 3.7, above.

Category (3) – D's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract

3.42 No respondent thought that apportionment should be excluded in category (3) cases. It was acknowledged that it would be undesirable to have contributory negligence as a defence in one cause of action arising out of the same facts and not in another.

Distinction between category (1) and other contracts

3.43 A few respondents suggested that it would be very difficult to formulate a workable statutory distinction between category (1) and other contracts. It was suggested that any attempt to distinguish between them would lead to uncertainty and argument. This led some to the conclusion that, as apportionment is basically right, it should apply to all contractual relationships. Others took the view that, as apportionment is unacceptable for category (1) contracts, it must be rejected outright.

3.44 We do not agree that a distinction between the two types of contracts will be unworkable. The Unfair Contract Terms Act 1977 makes such a distinction in the definition of negligence in section 1(1)(a). It is defined as:

> "the breach . . . of any obligation, arising from the express or implied terms of a contract, to take reasonable care or exercise reasonable skill in the performance of the contract".

This definition does not appear to have given rise to any difficulties, and we are not aware of any cases in which it has been discussed. No borderline cases which would be particularly difficult to categorise were brought to our attention by respondents.[119] We believe that a distinction between contractual duties to take reasonble care or exercise reasonable skill or both and all other contractual duties will be easier to make than the present distinction between cases where a duty of care is owed co-extensively in contract and tort and where a duty of care is owed only in contract.[120]

Issue (iii): whether the scope and nature of the contractual obligation broken should be taken into account

3.45 In the consultation paper we provisionally concluded that in determining whether the plaintiff's conduct was so unreasonable as to amount to contributory negligence, the court should "take into account the nature and extent of the contractual undertaking, including the extent to which it was reasonable for [the plaintiff] to rely on [the defendant] and the parties' relative expertise."[121] However, we invited comment only on the question whether the ability of the court to reduce damages should take into account the nature and scope of the contractual obligation broken. Almost all the respondents who considered this question thought that it should. One of them suggested, and we agree, that it is the nature and scope of the entire contract which is important and not just the particular obligation broken.

3.46 Few respondents commented on the question whether the court should be directed to take into account the reasonableness of the plaintiff's reliance on the defendant and the relative expertise of the parties. Some of those that did considered that the court should be so directed. However, one argued that these general matters were not relevant in contract. It was said that if the defendant contracted to produce a particular result it could not be negligence on the part of the plaintiff to rely on his doing so. She, therefore, proposed that the court should confine itself to what the parties had agreed and should analyse their contractual obligations, not their general relationship and actions. Another suggested that a plaintiff should only be at fault for the purposes of contributory negligence if he was in breach of an implied term of the

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[119] Para. 4.10, below discusses the types of clause that would fall within and without the definition.
[120] See para. 3.27, above.
[121] Working Paper No. 114, para. 5.1. See also paras. 3.6 – 7, above.

contract. We believe that the parties' contractual obligations should be of paramount importance in assessing whether the plaintiff's conduct was reasonable. In some cases they will altogether exclude the possibility of the plaintiff's conduct constituting contributory negligence. However, where the defendant does not guarantee to produce a particular result, but only undertakes to take reasonable care, we consider that the relative expertise of the plaintiff and defendant is indeed a relevant consideration.[122] It is not necessary to make specific provision for this factor since the court already takes it into consideration where it is able to apportion in contractual cases.[123]

3.47 The question whether it was reasonable for the plaintiff to rely on the defendant, will, in our opinion, depend on the nature and terms of the contract[124] and the parties' respective expertise. We consider, therefore, that there is no need to direct the court to this issue specifically. Another suggestion made by a respondent was that the court should be directed to consider the foreseeability of the plaintiff's negligence contributing to his loss. We believe that this matter is relevant, but it is already taken into account[125] and, once again, no specific direction is required.

Issue (iv): whether the proposed reform has particular implications in different contexts

3.48 Most respondents saw no need for special rules for contracts dealing with particular subjects or in particular forms, even though the proposed reform might have special implications in certain areas. We turn now to the specific contexts mentioned in the consultation paper.

Banking

3.49 We received few comments on the implications of the proposed reform for banking. Those who did comment tended to prefer our proposals to those of the Review Committee on Banking Services Law[126] on the ground that the former, unlike the latter, would not operate solely in favour of banks. However, a few pointed out that it was already open to banks to protect themselves against their customers' negligence by stipulating in their contracts, subject to the Unfair Contract Terms Act 1977, that the customer should take reasonable precautions to prevent forged cheques being presented, or to check bank statements. They suggested that the reason that banks did not do this was the fear of losing business in a competitive market. Fears were also expressed that, in the event of a dispute, banks would usually be in the stronger bargaining position. If apportionment were available this would encourage banks to raise technical defences, such as the consumer's failure to examine a bank statement, to valid claims. It was also pointed out that many banking claims are in debt rather than damages. There was some dispute as to whether it was appropriate to have apportionment for claims in debt. These issues are discussed in more detail in paragraphs 5.19–21, below.

Construction

3.50 A number of respondents suggested that the proposed reform might cause difficulties in the context of the construction industry. Three main concerns were expressed. The first was that if the contributory negligence of independent contractors could not be imputed to the plaintiff, while that of employees could, this would cause injustice. The example was given of a building owner escaping a reduction of damages where his independent contractor architect was negligent, but not where the negligent architect was an employee. We do not agree that this would cause injustice. Where the architect is an employee he will not be financially independent and the building owner will be in a better position than his employee to insure against his negligence. It is right that the building owner should bear the costs of his employee's negligence. On the other

[122] In any event, the court would probably take this factor into account in determining whether there was an implied contractual obligation on the plaintiff to take reasonable care.

[123] *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] Lloyd's Rep. 431, 460: the defendant broker was liable for breach of concurrent duties owed in contract and tort. When holding the plaintiff insurers contributorily negligent the court took into account the fact that they were marine underwriters of great experience. See also para. 4.12, below.

[124] See para. 4.12, n. 36, below.

[125] *Jones* v. *Livox Quarries Ltd.* [1952] 2 Q.B. 608, 615 – 6; *Moor* v. *Nolan* (1960) 94 I.L.T.R. 153.

[126] *Banking Services: Law and Practice, Report by the Review Committee* (Chairman, Professor Jack) (1989), Cm. 622. See Working Paper No. 114, appendix.

hand, if the architect is an independent contractor he will be financially independent and can be expected to insure against his own negligence. If his negligence contributes to the plaintiff building owner's loss, the defendant building contractor may seek a contribution from him under the Civil Liability (Contribution) Act 1978.

3.51 The second concern was that the possibility of apportionment on the grounds of the failure of an employee supervisor[127] might encourage contractors deliberately to take short cuts in the performance of their contractual duties with a view to maximising their profits in the knowledge that if their breach of contract were to be detected the damages for which they would be liable would be reduced on the ground of contributory negligence. We believe that such concerns may have been exaggerated since competition and considerations of commercial reputation would deter such practices. Furthermore, in exercising its discretion to apportion the court would take into account the fact that a breach was committed deliberately, solely in order to enhance profits.[128] If, however, this is perceived as a major problem, it will be possible for the standard terms and conditions used in the construction industry to exclude apportionment on the ground of failure to supervise.[129]

3.52 Third, it was questioned how apportionment would affect chains of contracts. We will take the example of a contractor who has a contract with the owner of land to carry out construction work, and who subcontracts that work to a third party. The sub-contractor carries out defective work in breach of contract. The owner's contributory negligence is a partial cause of the damage. The question arises whether, in an action for breach of contract brought by the contractor against the sub-contractor, the contractor's damages will be reduced on the basis that his liability to the owner is reduced as a result of the owner's contributory negligence. We consider first the position where the contractor has executed the remedial work which was necessary as a result of the sub-contractor's breach. Provided it was within the reasonable contemplation of the parties to the sub-contract that he would execute the work, he will recover the reasonable costs of execution. His damages would not be reduced unless the owner's contributory negligence took the fact that he would carry out the work out of reasonable contemplation. Second, we look at the situation where the contractor claims damages in respect of the liability which he has incurred to the owner. In these circumstances the sub-contractor will be liable for the contractor's actual liability, which is reduced on account of the owner's contributory negligence. This causes no problems if the extent of the contractor's liability to the owner has been established.[130] If, however, the extent of the contractor's liability is not clear, there could be difficulties in assessing the quantum of the contractor's loss. These could be resolved by the sub-contractor issuing a third party notice requiring the extent of the contractor's liability to the owner and the question whether the owner had been contributorily negligent to be determined.[131]

3.53 We concluded that some of the concerns of the construction industry had been overstated. If the industry is still unconvinced, it will be able to exclude apportionment in its standard form contracts.

Employment

3.54 Several respondents drew our attention to the Employment Protection (Consolidation) Act 1978, which provides that where a plaintiff has caused or contributed to his unfair dismissal the Industrial Tribunal shall reduce his compensation as it considers just and equitable.[132] It was suggested that there was an anomalous distinction between this remedy and the common law claim for wrongful

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[127] As to which see paras, 4.12 and 4.15, example 3, below.

[128] The court takes into account the 'blameworthiness' of the parties when deciding what is just and equitable: see para. 2.5, above.

[129] One consultee suggested that a standard exclusion of apportionment would be incorporated in the JCT Contract forms.

[130] By a court order, or under the terms of a reasonable settlement: May, *Keating on Building Contracts* (5th ed., 1991), pp. 200, 298 - 299.

[131] R.S.C. Ord. 16, r. 1(c). The sub-contractor would need the leave of the court to do this unless the action was begun by writ and he issued the notice before serving his defence on the contractor: r.2.

[132] Ss. 73(7B), 74(6).

dismissal, in respect of which apportionment is not available. We do not agree. The statutory remedy for unfair dismissal is an extra layer of protection on top of the employee's contractual rights. Once an employee has been in continuous employment for two years his dismissal may be found to be unfair, even if it has been carried out in accordance with the terms of his contract of employment.[133] While Parliament may have thought it unfair for the employer to have to pay this extra compensation in full where the employee contributes to his dismissal, this does not justify a deviation from the employee's basic right to damages for breach of the strict duty to give him his contractual entitlement to notice.

Insurance

3.55 Respondents made very little comment on the implications of the proposed reform for the insurance industry. However, a small number agreed with the view which we expressed in the consultation paper[134] that apportionment would be inappropriate in a claim under a contract of liability insurance. We remain of that opinion.

Landlord and tenant

3.56 Very few respondents commented on how the proposed reform would affect the law of landlord and tenant. The only concerns which were expressed related to the possibility of the evasion of strict liabilities by either landlord or tenant.

Consumer contracts

3.57 A number of respondents raised concerns in relation to consumer contracts. These were mainly to the effect that a rule of apportionment in contract would further weaken the bargaining position of consumers and would be contrary to legal and social policy. They have been dealt with more fully above.[135] However, no respondent suggested that the operation of apportionment where there is liability for breach of a contractual duty of care concurrently with liability for breach of a tortious duty of care created problems for consumers.

Standard forms

3.58 Most respondents saw no reason to accord special treatment to standard form contracts. We agree. Apportionment could, and some respondents suggested frequently would, be expressly excluded in standard form contracts.

Issue (v): whether reform should be of the 1945 Act or otherwise

3.59 Respondents did not regard the form of legislation as a major issue. Opinion, both legal and non-legal, was divided as to whether it was preferable to amend the 1945 Act or have a new statute dealing with contributory negligence in contract. Little was added to the arguments set out in the consultation paper.[136] We have concluded that, for the reasons set out in paragraph 4.31 – 33 below, our recommendations should not be implemented by amendment of the 1945 Act.

Conclusion

3.60 In the light of the reservations expressed on consultation, we have revised our provisional conclusion. We accept that apportionment where there is liability for breach of a strict contractual duty would be wrong in principle and would cause difficulties in practice.[137] However, we still consider that apportionment on the ground of contributory negligence should be available where the defendant is in breach of a contractual duty of reasonable care, irrespective of whether he is concurrently in breach of a tortious duty of care.[138]

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[133] Employment Protection (Consolidation) Act 1978 ss. 55 and 57.
[134] Working Paper No. 114, paras. 2.7, 4.5.
[135] See paras. 3.35 - 37 and 3.40, point 3, above.
[136] Working Paper No. 114, paras. 4.42 - 43.
[137] See paras. 4.2 - 6, below.
[138] See paras. 4.7 - 15, below.

PART IV

RECOMMENDATIONS

Principal recommendation

4.1 The Commission's main recommendation is that apportionment of the plaintiff's damages on the ground of contributory negligence should be available in actions in contract where the defendant is in breach of an express or implied contractual duty to take reasonable care or exercise reasonable skill or both, but not where he is in breach of a contractual term which imposes a higher level of duty (which we refer to as "strict"[1]).

Liability for breach of a strict contractual duty

4.2 We have rejected the possibility of apportionment where there is liability for breach of a strict contractual obligation for reasons both of principle and pragmatism. The reason of principle relates to a consideration of the position before the plaintiff is aware, or must be taken to be aware, of the defendant's breach of contract. If the defendant commits himself to a strict obligation regardless of fault,[2] the plaintiff should be able to rely on him fulfilling his obligation and should not have to take precautions against the possibility that a breach might occur.[3] This is the position under the present law[4] and we consider that it would be wrong in principle to deviate from it. The rules on mitigation, although not a perfect substitute for apportionment, mean that the plaintiff is not entitled to act unreasonably once he is aware of his loss or of the defendant's breach.[5]

4.3 An example of the type of situation we have in mind is that in *Lambert* v. *Lewis*.[6] There a farmer suffered loss when an accident occurred as the result of his use of a defective coupling supplied by the defendant. On the facts of the case his conduct was held to have broken the chain of causation as he had continued to use the coupling after he had become aware that it was damaged, without taking steps to have it repaired or to ascertain whether it was safe to use. However, the House of Lords indicated that if the accident had happened before the damage had become apparent to him he would have been able to recover damages for breach of warranty. In those circumstances he would "have had a right to rely upon the dealers' warranty as excusing him from making his own examination of the coupling to see if it were safe."[7] We consider that this principle is correct. Where the plaintiff is a consumer, it is likely that the court would, in any event, find that it was reasonable, and not contributorily negligent, for him to rely on the defendant's warranty.[8] However, this would not necessarily happen where the plaintiff is a professional or a commercial body.[9] In the latter circumstances the court might well consider that he should have been aware of the risk that the goods supplied might be faulty and should have checked them before use.

4.4 Another example is that of a proprietor of a restaurant who purchases an electric deep fat fryer. The fryer has a defect which means that it overheats dangerously. If the chef employed by the proprietor had been alert he might have realised that the fryer was overheating. However, he did not notice and a fire ensued. In those circumstances we believe that it is right in principle for the proprietor to recover in full for the damage caused by the fire. It should not be open to the defendant to argue that the chef was contributorily negligent in failing to keep an eye on the fryer to ensure that it was functioning correctly. The defendant had contracted to supply a fryer of merchantable

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[1] See para. 1.4, above.

[2] See para. 3.24, above.

[3] See Coote, "Contributory Negligence Reform and the Right to Rely on a Contract" [1992] N.Z. Recent L. Rev. 313, 318. Even the New Zealand Law Commission, which favoured apportionment across the board, was concerned about this possibility and made specific provision to attempt to avoid it: see para. 2.16 above.

[4] The so called 'duty' to mitigate does not arise until the plaintiff is aware of the breach: see para. 3.20, above.

[5] See paras. 3.19 – 3.21, above.

[6] [1982] A.C. 225.

[7] *Ibid.*, p. 276. See also *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68, 77 *per* Devlin J.: "generally speaking, a man is entitled to act in the faith that the other party to a contract is carrying out his part of it properly. It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own enquiries to see whether it is or not", approved *Reardon Smith Line Ltd.* v. *Australian Wheat Board* [1956] A.C. 266, 282.

[8] We explain in para. 4.6, below, why, nevertheless, we are not in favour of reform in relation to liability for breach of a strict contractual duty owed to a consumer.

[9] See paras. 4.11 – 13, below.

quality, and the proprietor was entitled to rely on his so doing.[10] A final example is that of a builder who purchases a step-ladder from a wholesaler. One of the top rungs of the step-ladder is badly cracked. If the builder had carried out a cursory check of the ladder before using it he would have noticed the crack. However, he was in a hurry and did not. When he trod on the damaged rung it snapped, causing him to fall off and break his leg, leaving him unable to work for six weeks. Again, we consider that the builder was entitled to rely on the wholesaler's warranty and that there should be no question that his damages should be reduced for contributory negligence on the ground that he did not check the ladder before using it.

4.5 Although the reason of principle relates only to a limited situation, for which provision could be made by careful legislative drafting, the comments of respondents to the consultation paper, have convinced us that apportionment in cases involving breach of a strict duty would be undesirable in practice.[11] This is because, in order to apportion the plaintiff's damages, it would be necessary to consider the quality of the defendant's conduct, which is, at present, irrelevant.[12] This would increase the number of issues which have to be determined, and would lead to undesirable complexity.[13] The need to quantify the degree to which a defendant is to blame (for the purposes of calculating the appropriate reduction in the plantiff's damages) in circumstances where his fault is irrelevant and difficult to assess would also create uncertainty.[14]

4.6 We are opposed to any reform which would result in a substantial increase in uncertainty in contract, because this would make settlements more difficult to achieve, payments into court harder to assess, and trials longer and more expensive. This would not aid the efficient functioning of commerce and industry which requires that disputes be capable of quick resolution. In the United States the Federal Court of Appeals of the Fifth Circuit has said:

> "in commercial disputes between seasoned bankers and other business men, certainty of result is more important than in traditional tort litigation. In commercial relationships known risks can be priced or shifted to others; if disputes arise, a bright line rule results in faster, easier settlements."[15]

The Scottish Law Commission concluded that to allow the defence of contributory negligence in cases of strict liability would "give rise to such uncertainty in commercial dealings as to be unacceptable".[16] This view was confirmed by two of our respondents who suggested that the reason that apportionment is rarely provided for in commercial contracts is that the parties in commerce do not wish to be subject to the uncertainties of the apportionment remedy.[17] An increase in uncertainty would also, as explained in paragraphs 3.35 – 3.37 and 3.40 (3), be particularly detrimental to the interests of consumers, the protection of whom requires a simple and clear regime. Apportionment would also be contrary to legal and social policy where Parliament has deliberately imposed on the defendant a strict contractual obligation in order to protect consumers and other potentially vulnerable contractors.[18] We were thus convinced that apportionment in cases of strict contractual liability had a number of substantial drawbacks which could not be met by careful legislative drafting. We concluded that it would benefit neither commercial interests, nor consumers, and should not be recommended.

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[10] If the chef had been put on enquiry as to the existence of the defect, for example, if he had noticed that an item of food had blackened and smoked immediately when placed in the fryer, but had nonetheless continued to use the fryer, his conduct might be held to have broken the chain of causation: *Schering Agrochemicals Ltd.* v. *Resibel N.V. S.A.* 26 November 1992 (unreported, C.A.). See para. 3.11, above.

[11] See also para. 2.19, above on the problems experienced in France with apportionment where there is strict liability in relation to road accidents.

[12] Paras. 3.24 and 3.30, above.

[13] Para. 3.30, above.

[14] Paras. 3.24 and 3.32, above.

[15] *Bradford Trust Company of Boston* v. *Texas American Bank – Houston* 790 F.2d 407 (1986) (5th Circuit Court of Appeals) 407, 409, citing *Prosser and Keeton on The Law of Torts.*

[16] Scot. Law Com. No. 115, *Report on Civil Liability – Contribution* (December 1988), para. 4.20.

[17] See para. 3.31, above.

[18] Para. 3.40, point 3, above.

Liability for breach of a contractual duty of reasonable care

4.7 Where the plaintiff has suffered damage partly as the result of his own failure to take reasonable care for the protection of himself or his interests and partly as the result of the defendant's breach of a contractual duty to take reasonable care or exercise reasonable skill, we believe that it is correct in principle for his damages to be apportioned. As we stated in the consultation paper, there is a clear similarity in substance between an action for breach of a contractual duty of care and an action for breach of a tortious duty of reasonable care.[19] Whether a duty of reasonable care is classified as tortious or contractual does not affect the content of that duty, and it is not, in our view, desirable that the availability of apportionment should depend upon how the duty is classified.[20] Furthermore, where the defendant undertakes only a contractual duty of reasonable care, he has not (in contrast to the case where he has accepted a strict contractual obligation) guaranteed to produce a particular outcome. Thus it is unfair to assume that he has undertaken to compensate the plaintiff even where the plaintiff has contributed to his own loss.[21] As seen above,[22] the rules on causation, remoteness and mitigation do not provide an adequate substitute for apportionment and can be unfair to either defendant or plaintiff. This is because they either produce 'all or nothing' results, or do not have the flexibility of apportionment on the basis of what the court thinks just and equitable, given the agreed allocation of risks.

4.8 Nor do we consider that the introduction of apportionment on the ground of contributory negligence would result in the practical problems outlined in paragraphs 4.5 and 4.6, above. As explained in paragraphs 3.30 - 34, apportionment will not cause significant uncertainty where the defendant is in breach of a contractual duty of reasonable care. It is already necessary to consider the quality of the defendant's conduct. Considerations of the extent to which he is at fault will not, therefore, add appreciably to the issues to be determined. Nor will the calculation of the quantum of the reduction in the plaintiff's damages be as troublesome as it would be in cases of strict liability. The courts already have expertise in apportioning damages in cases where the defendant is in breach of a contractual duty of care (even in relation to economic loss)[23] provided that this duty is concurrent with a tortious duty. Another valid consideration is that it is much easier to weigh the defendant's blameworthiness against that of the plaintiff where both are at fault in failing to exercise reasonable care, than it is in the situation where the defendant's fault is irrelevant to liability.[24]

4.9 We mentioned in paragraph 3.27 that cases of co-extensive liability in contract and tort are now on the decrease. So far as we can see, however, this change has not occurred for reasons which are in any way connected with the question whether there should be apportionment. As we have already indicated, the shift in the basis of liability does not change the practical effect of the plaintiff's contributory negligence, but a decrease in category (3) cases of co-extensive liability will result in a change in the legal effect of such contributory negligence. A reduction in category (3)[25] may, therefore, increase the pressure to argue that there is co-extensive liability in tort in order to avoid the all or nothing result of a case being held to fall within category (2). We consider that it is very undesirable for the availability of apportionment in contract to depend upon the vagaries of the law of tort. The extension of apportionment to cases where there is liability for breach of a duty of reasonable care owed only in contract would remove the need to consider whether there was concurrent liability in tort and would resolve this problem. On one view it could be regarded as reinstating the earlier position when it was thought that apportionment was available in category (2) cases,[26] and it need not, therefore, be seen as a radical change.

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[19] Working Paper No. 114, para. 5. 1.

[20] For example, in *Barclays Bank Plc* v. *Fairclough Building Ltd.*, 13 May 1993, (unreported, Judge Havery Q.C.), the plaintiff contended (unsuccessfully) that he had no co-extensive claim in tort in an attempt to avoid apportionment under the 1945 Act.

[21] Para. 3.22, above.

[22] Paras. 3.8 - 21.

[23] For example, *Forsikringsaktieselskapet Vesta* v. *Butcher* [19891 A.C. 852 (C.A.), aff'd [1989] A.C. 880 (H.L.).

[24] See paras. 3.23 - 24, above.

[25] The categories are set out in para. 3.38, above.

[26] See para. 2.2, above.

4.10 The extension of apportionment to all cases where there is liability for breach of a contractual duty to take reasonable care or exercise reasonable skill might, however, be thought to create new uncertainty as to whether the contractual duty which has been breached is one to exercise reasonable care and skill or imposes some higher level of duty. We do not consider that this distinction would be especially problematical. The definition in clause 1(1) of our draft Bill of the type of contractual duty in respect of which the proposed reform applies uses similar language to that used in the definition of negligence in section 1(1)(a) of the Unfair Contract Terms Act 1977. As explained in paragraph 3.44, above, the definition does not seem to have given rise to particular difficulties in that context. It would catch, for example, a duty to build "in a skilled and workmanlike manner", but not a duty which imposes a higher than ordinary level of care, for example, a duty to use "the highest standards of workmanship". It would apply to the contractual duties of reasonable skill and care implied by statute,[27] for example, the duty implied by section 13 of the Supply of Goods and Services Act 1982. However, it would not affect the implied terms as to quality and fitness in section 4 of that Act or in section 14 of the Sale of Goods Act 1979. A duty to use specified materials "insofar as they are reasonably procurable" would fall within the definition when considering the extent to which the promisor must go in order to procure the goods, but outside it in relation to the strict duty to provide materials of the contractual quality. Another example is the duty on a carrier under section 3 of the Carriage of Goods by Sea Act 1971 and Article III rule 1 of the Hague Rules[28] to exercise due diligence to make the ship seaworthy. Although this imposes a personal obligation on the carrier which cannot be discharged merely by proving that he engaged competent experts to make the ship seaworthy,[29] the standard of due diligence required of the carrier and those he engages is the equivalent of the common law duty of care.[30] It would thus fall within the definition. We, therefore, believe that the test specified in our proposed Bill[31] will be much clearer than the present distinction between categories (2) and (3).

4.11 A question has arisen whether apportionment on the ground of contributory negligence would impose a duty on a plaintiff to supervise the performance of the defendant's obligations under the contract. We considered this point in the consultation paper where we said that it would not normally be unreasonable (and therefore not contributorily negligent) for a party to a contract to rely on the other party to perform the task he has undertaken.[32] We said that the starting point would be the terms of the contract.[33] If there was an express or implied undertaking by the plaintiff to supervise the performance of the contract, we considered that failure to do so would be more likely to constitute contributory negligence. We also said that failure to supervise might amount to contributory negligence if the plaintiff had greater expertise than the defendant, or possibly if experience showed that negligence on the part of a person in the defendant's position was common.[34] Finally, we said that failure to supervise by a lay person or consumer contracting with a professional person was unlikely to amount to contributory negligence.

4.12 We remain of these views. It follows that whether an omission to supervise constitutes contributory negligence will depend on the terms of the contract, whether the plaintiff's experience was such that he could reasonably be expected to have checked

[27] The reform would not affect statutory duties, for example the duty under the Defective Premises Act 1972 to see that work is done in a workmanlike or professional manner. The 1945 Act already applies to statutory duties: s. 4.

[28] Enacted in the Carriage of Goods by Sea Act 1971, s. 1(2) and Sch. See also the duty under Article III, rule 2.

[29] *Riverstone Meat Company Pty. Ltd.* v. *Lancashire Shipping Co. Ltd. (The "Muncaster Castle")* [1961] A.C. 807; *Union of India* v. *N.V. Reederij Amsterdam* [1962] 1 Lloyd's Rep. 539, 546, rev'd [1962] 2 Lloyd's Rep. 336 (C.A.), restored [1963] 2 Lloyd's Rep. 223 (H.L.). See Mocatta, Mustill and Boyd, *Scrutton on Charterparties and Bills of Lading* (19th ed., 1984), pp.434 – 5.

[30] *Union of India* v. *N.V. Reederij Amsterdam, ibid.* at 235.

[31] Clause 1(1).

[32] Para. 2.4.

[33] Para. 2.7.

[34] Working Paper No. 114, para. 2.8.

the defendant's performance, and whether he had the opportunity to do so.[35] The contractual undertaking of a task by a defendant will normally entitle a plaintiff to rely on the defendant carrying out his undertaking without checking on the defendant's work.[36] For example, in *Richard Roberts Holdings Ltd.* v. *Douglas Smith Stimson Partnership*[37] the owner of a dyeworks employed a firm of architects to design an effluent tank. The architects obtained a "suspiciously cheap" quotation for a lining for the tank and put it to the owner without making further enquiries and without any warning. The architects alleged that the owner had been contributorily negligent in accepting the quotation, but Judge Newey Q.C. disagreed. He said that the owner "was entitled to rely upon the architects for advice; there was no point in employing them otherwise."[38] In *Barclays Bank PLC* v. *Fairclough Building Ltd.*[39] the fact that the plaintiff itself was appointed architect under the contract meant that it could not reasonably leave the implementation of the work to the defendant, although the defendant was an experienced and reputable contractor. However, Judge Havery Q.C. said that generally, if a plaintiff appoints a reputable contractor to carry out work, he is "entitled to rely on the contractor to carry out the work properly, and does not have to keep an eye on the contractor to forestall breach of contract or negligence on its part." We would expect a high degree of expertise[40] on the part of a plaintiff to be required before his omission to supervise contractual performance would be held to constitute failure to take reasonable care of his own interests. An example of a situation where an omission to supervise might constitute such a failure lies in the construction field. Most construction contracts provide that the owner or his supervisor has the right to inspect the work as it proceeds and that the supervisor has the right to call for tests and to require the removal and re-execution of work which is not in accordance with the contract.[41] The fact that the contract provides that supervision will take place, combined with the high degree of expertise of the supervisor, means that a court might hold the owner contributorily negligent on the grounds of an employee supervisor's negligence in the performance of his duties.[42] An omission to supervise would not, however, amount to contributory negligence if it consisted, for example, in the failure of a lay person to check the calculations of his accountant on his tax return.[43] We, thus, believe that, as indicated by the weight of authority on the 1945 Act and similar legislation in other jurisdictions, a consumer's failure to supervise or check the defendant's performance is extremely unlikely to constitute contributory negligence.

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[35] See *Youell* v. *Bland Welch & Co. Ltd. (The "Superhulls Cover" Case) (No. 2)* [1990] 2 Lloyd's Rep. 431, 460 – 1 where insurers were said to have been contributorily negligent for failing to check the terms of cover obtained by their brokers. The insurers were highly experienced Lloyd's agents and had been given the opportunity to check the terms to ensure that they accorded with their instructions. See also *Forsikringsaktieselskapet Vesta* v. *Butcher,* above, where a plaintiff insurance company was held 75% to blame on account of its contributory negligence in failing to check that the defendant broker had carried out the plaintiff's instructions.

[36] *Becker* v. *Medd* (1897) 13 T.L.R. 313, 314 ("The person who had undertaken the duty could not say that he had been negligent in . . . [its performance] . . . but that the other person was guilty of contributory negligence in not finding him out.", *per* Lord Esher M.R.). See also *JEB Fasteners Ltd.* v. *Marks, Bloom & Co.* [1981] 3 All E.R. 289, 297 (*per* Woolf J.), aff'd. [1983] 1 All E.R. 583 and *Gran Gelato Ltd.* v. *Richcliff (Group) Ltd.* [1992] Ch. 560, 574 (scope for contributory negligence limited in cases of negligent misstatement because if it is reasonable to rely on a statement, it is difficult to envisage circumstances where as a matter of fact it would be negligent to do so); *Cosyns* v. *Smith* (1983) 146 D.L.R. (3d) 622; *Walker* v. *Hungerfords* (1987) 44 S.A.S.R. 532, 553, aff'd. (1988) 84 A.L.R. 119; *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp & Paper Mills Ltd.* [1955] 2 Q.B. 68, 77 (*per* Devlin J.), approved in *Reardon Smith Line Ltd.* v. *Australian Wheat Board* [1956] A.C. 266. See further, Williams, *Joint Torts and Contributory Negligence,* (1951), pp. 214, para. 375 - 6; Dugdale & Stanton, *Professional Negligence* (2nd ed., 1989), paras. 21.24 – 21.26; *Jackson & Powell on Professional Negligence,* (3rd ed., 1992), para. 1–82.

[37] (1988) 46 B.L.R. 50.

[38] *Ibid.,* 68.

[39] 13 May 1993, (unreported, Judge Havery Q.C.).

[40] See, for example, *Carradine Properties Ltd.* v. *D.J. Freeman & Co.* (1982) 5 Cons. L.J. 267 and (1985) 1 P.N. 41 where (in the context of considering the scope of a solicitor's duty) Donaldson L.J. said at 41 "An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client".

[41] *Halsbury's Laws of England* (4th ed., 1992), vol. 4(2), para. 399; The JCT Standard Form of Building Contract (1980 ed.) clauses 4, 11, 12 in May, *Keating on Building Contracts* (5th ed., 1991), pp. 492 – 5, 513 – 4.

[42] In *Kensington and Chelsea and Westminster Area Health Authority* v. *Wettern Composites Ltd.* [1985] 1 All E.R. 346, 351 the negligence of a clerk of works employed by the plaintiff led to a 20% reduction in the architect's liability for negligence.

[43] The facts are similar to those in *Walker* v. *Hungerfords* (1987) 44 S.A.S.R. 532, aff'd (1988) 84 A.L.R. 119 where the plaintiff submitted erroneous calculations to his accountant.

4.13 We conclude that the concern that the availability of the defence of contributory negligence in relation to contractual duties of care might lead to the imposition of a general duty on a plaintiff to supervise the performance of the defendant's obligations under the contract is misplaced and should not be an obstacle to reform. Where the plaintiff is a lay person or consumer, his failure to check that the professional person with whom he contracted was carrying out his duties correctly is highly unlikely to constitute contributory negligence. In the case of professional people, much will depend on the experience of the contracting parties and the terms of the contract. In practice, we would not expect a court to hold that failure to supervise constituted a failure by the plaintiff to take reasonable care of his own interests unless it was very clear in the circumstances that he should have done so. Although failure to supervise is more likely to constitute contributory negligence in the context of construction, as explained in paragraph 3.51, we are not convinced that this will lead to the surge of deliberate contract breaking which has been suggested by some consultees. Another reason why this is unlikely to happen is that imputed contributory negligence will not generally extend to the activities of independent contractors,[44] and many supervisors will be independent contractors rather than employees.

4.14 A final potential obstacle to reform was raised by a few respondents. This was that a distinction in the treatment of strict contractual duties and of contractual duties of care would, where the two types of duty co-exist, for example in a contract for the provision of goods and services, inevitably lead to different results according to the duty upon which the plaintiff relied. It was suggested that this would give rise to anomalies. However, this already happens under the law as it stands at present. For example, in *Young & Marten Ltd.* v. *McManus Childs Ltd.*[45] a roofing sub-contractor supplied and fitted tiles in which there was a latent defect. The defect was not discoverable by reasonable examination and the tiles had been supplied by the manufacturer nominated for that purpose in the contract. The House of Lords distinguished between the duty to fit the tiles, which was a duty of care, and that to supply them, which imposed strict liability,[46] and held the sub-contractor liable for breach of the latter. The fact that the plaintiff had no remedy in relation to the former duty, since the sub-contractor had not been negligent, was irrelevant. We do not, therefore, believe that the proposed reform will cause anomalies where there are concurrent contractual duties, some strict and some of reasonable care. If the strict duty is breached the plaintiff will be free to seek a remedy for it. The existence of an alternative lesser remedy for breach of the duty of care should not affect his position. The position is similar to that which arises under the present law where the defendant is in breach of both a strict contractual duty and a tortious duty of care, examples of which arose in *Vacwell Engineering Co. Ltd.* v. *B.D.H. Chemicals Ltd.*[47] and *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. (The "Good Luck")*[48] discussed in paragraph 3.29 above.

4.15 We have, therefore, concluded that apportionment on the ground of contributory negligence should be available where a defendant is in breach of a contractual duty to exercise reasonable skill or reasonable care or both. Examples of the type of situation which would be affected by the proposed reform are:

1. A houseowner employs a builder to build an extension on the back of his house. In the course of working on the extension the builder digs a large hole. He leaves work in a hurry and, in breach of his agreement to take reasonable care to leave the site in a safe condition, forgets to fence off the hole. The houseowner decides to record on video the construction work. He fails to watch where he is going, falls into the hole and smashes his camcorder. His damages for breach of contract would be reduced on account of his contributory negligence.

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[44] See para. 2.4, above.

[45] [1969] 1 A.C. 454.

[46] *Ibid.*, 465.

[47] [1971] 1 Q.B. 88, defendant in breach of the strict condition of fitness for purpose under s. 14(1) of the Sale of Goods Act 1893 and of a tortious duty to take reasonable care.

[48] [1988] 1 Lloyd's Rep. 514, 555, aff'd H.L. [1992] 1 A.C. 233, 266. See Working Paper No. 114, para. 3.33, n. 89.

2. A company engages an engineer to supply and fit a new transformer in its factory. The company's foreman and the engineer work together in checking the electrical circuitry, and the foreman participates in the decision to proceed with the installation. Neither the engineer, nor the foreman, realises that the main cable will be unable to cope with the increased power requirements. As a result the cable burns out and the company suffers economic loss. The engineer was in breach of his contractual duty to take reasonable care in carrying out the work, but the foreman had also failed to take reasonable care in checking the electrical circuitry.[49] The company's damages for breach of contract would, therefore, be subject to apportionment on the grounds of its foreman's contributory negligence.[50]

3. A contractor is engaged by the owner of a plot of land to build an office block on the land. The contract specifies that the contractor must execute the work "in a skilled and workmanlike manner", and gives the owner or his supervisor the right to inspect the work as it proceeds and to require the removal and re-execution of work which is not up to standard. The owner's employee architect supervises the construction of the building. The contractor does not build the foundations of the block properly. If the architect had carried out his duty to supervise properly he would have detected the error at an early stage in the building work and it could have been corrected. It is not detected and the owner suffers economic loss. The negligence of the architect would be imputed to the owner and his damages for breach of contract would be reduced on the ground of contributory negligence. If the contractor had sub-contracted the work to a third party, the position would be as outlined in paragraph 3.52.

4. A painter and decorator contracts to paint a houseowner's dining room. It was understood between the parties that the houseowner would remove or cover any furniture which he was concerned to protect. However, he leaves a valuable antique sideboard in the room and forgets to cover it with a dust sheet. In breach of his contractual obligation to carry out the painting with reasonable skill and care, the painter splashes the sideboard with paint. The houseowner's damages for breach of contract would be reduced to reflect his contributory negligence.

Accordingly, **we recommend that:**

1. Where a plaintiff suffers damage as the result partly of the breach of a contractual duty to take reasonable care or exercise reasonable skill or both, and partly of his own contributory negligence, the damages recoverable by him in respect of that damage should be subject to a reduction (Clause 1(1) of the Draft Bill).

The definition of contributory negligence

4.16 Contributory negligence is referred to in the 1945 Act as "fault" and defined as "other act or omission . . . which would, apart from this Act, give rise to the defence of contributory negligence."[51] As we have seen,[52] contributory negligence is not a defence to an action for breach of contract at common law. The definition in the 1945 Act would not, therefore, cover a plaintiff s contributory conduct where he was in breach of a contractual duty of reasonable care which was not concurrent with a tortious duty of care. It is, therefore, necessary for our draft Bill to utilise a separate definition for actions in contract.

4.17 In the consultation paper we analysed what constituted contributory negligence in tort.[53] We said that it was established where a plaintiff did not take care of himself in his own interests and contributed by this want of care to his own injury. We pointed out that it was not necessary for the plaintiff to owe any duty to the defendant.[54] We

[49] See Working Paper No. 114, para. 2.9(b).
[50] See paras. 2.4, above and 5.2 – 3, below on imputed contributory negligence.
[51] S. 4. The other part of s. 4 relates to the defendant's fault: Working Paper No. 114, para. 3.2.
[52] Para. 2.6, above.
[53] Working Paper No. 114, para. 2.1.
[54] *Froom* v. *Butcher* [1976] Q.B. 286, 291.

consider that the definition for the purposes of actions in contract should encompass the same constituents. To this end the definition in the draft Bill refers to failure by the plaintiff to take reasonable care for the protection of himself or his interests.[55]

Accordingly, **we recommend that:**

2. Contributory negligence should be defined as the plaintiff's failure to take reasonable care for the protection of himself or his interests (Clause 1(1)(b) of the Draft Bill).

The basis for apportionment

4.18 As we have already explained,[56] the 1945 Act empowers the court to reduce the plaintiff's damages to such extent as it considers just and equitable having regard to the plaintiff's share in the responsibility for the damage. In determining responsibility both causation and blameworthiness are taken into account. We consider that the same criteria should apply whether liability is in tort or contract. To provide otherwise would create undesirable complications where there is concurrent liability in contract and tort.

4.19 It might be thought that apportionment on the basis of causation alone would produce the greatest certainty.[57] Apportionment on this basis would reflect the extent to which the plaintiff's contributory conduct caused his loss.[58] However, as we have already shown,[59] we believe there are difficulties of principle with apportionment on the basis of causation. A cause is something without which the damage would not have occurred. No one causal factor, therefore, can be greater or less than any other causal factor. Each must be equal in responsibility.[60] In principle, if causation were to be the only basis for apportionment, a plaintiff's damages would be reduced by half in any case in which he was contributorily negligent. In practice, the courts have tried to weigh the relative "causative potency"[61] of the plaintiff's actions against those of the defendant,[62] despite recognising the difficulties of apportionment on the basis of causation.[63] Their conclusions, however, have merely been that one party's actions had greater causative potency than those of the other. No clear guidelines as to how to calculate degrees of causation have been given, and we are not convinced that apportionment on this basis alone would result in particular certainty.

4.20 Apportionment on the basis of causation alone would have the further disadvantage that it would not reflect the relative blameworthiness or culpability of the plaintiff and defendant. This could result in injustice.[64] For example, in *The "Marimar"*,[65] which involved a collision between two ships, although the causative potency of the defendant's action was greater than that of the plaintiff's, liability was apportioned 60% to the plaintiff and 40% to the defendant, because the blameworthiness of the plaintiff, whose vessel had been travelling at excessive speed, was double that of the defendant. In those circumstances a result based on causation alone would have been inequitable. Similar situations can be envisaged in the field of contract. An example is that of a defendant who breaches his implied contractual duty to use reasonable skill and care in servicing the plaintiff's car and thus fails to rectify a steering fault. The plaintiff then

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[55] Clause 1(1)(b).

[56] Para. 2.5, above.

[57] See, for example Schwartz, "Apportionment of Loss Under Modern Comparative Fault: the Significance of Causation and Blameworthiness" (1991) 23 University of Toledo Law Review 141.

[58] We are concerned with causation of the damage itself rather than the incident which gave rise to the damage: *Froom* v. *Butcher* [1976] Q.B. 286, 292.

[59] See para. 3.14, above.

[60] See also Chapman, "Apportionment of Liability Between Tortfeasors" (1948) 64 L.Q.R. 26.

[61] *Ibid.*

[62] *The "British Aviator"* [1965] 1 Lloyd's Rep. 271, 279; *The "Marimar"* [1968] 2 Lloyd's Rep. 165, 172; *Stapley* v. *Gypsum Mines Ltd.* [1953] A.C. 663, 681. See also Hervey, "'Responsibility' Under the Civil Liability (Contribution) Act 1978" (1979) 129 N.L.J. 509, 510.

[63] *The "Marimar"* [1968] 2 Lloyd's Rep. 165, 172.

[64] See, for example, Williams, "Two Negligent Servants" (1954) 17 M.L.R. 66, 69: "To attempt to apportion damages by reference to degree of participation in the chain of causation is a hopeless enterprise, for it has no necessary connection with anything that would appeal to the ordinary person as being just and equitable."

[65] [1968] 2 Lloyd's Rep. 165.

drives the car substantially exceeding the speed limit. The combination of excessive speed and the steering fault causes the car to swerve and crash. While the actions of the plaintiff and defendant may be of equal causative potency, it will be just and equitable to reflect the plaintiff's recklessness when apportioning liability. For these reasons, we do not consider that causation should be the sole criterion by which liability is apportioned.

4.21 Apportionment on the basis of blameworthiness reflects the relative degree of culpability of the defendant and the plaintiff in bringing about the plaintiff's loss. Causation is still relevant to apportionment on this basis because liability for blameworthy conduct exists only if that conduct causes damage.[66] The criterion of blameworthiness is most appropriate where the fault of the plaintiff can easily be compared with that of the defendant. This is the position where the plaintiff's fault is of the same kind as that of the defendant (for example, failure to exercise reasonable care) and differs only in degree.[67] Since we recommend reform only in relation to liability for breaches of contractual duties of reasonable care,[68] we do not, therefore, envisage particular problems in relation to apportionment on the basis of blameworthiness.

4.22 We conclude that the present criteria for apportioning responsibility should be retained. The court should take account of causation and blameworthiness in deciding what is just and equitable. No respondent suggested that this formula was inappropriate in the context of contractual liability. The absence of comment may indicate that most respondents did not envisage difficulties with apportionment on this basis. Although considerations of blameworthiness might be thought to introduce too much uncertainty into the calculation,[69] we consider that they are essential if justice is to be done between the parties. Apportionment on the basis of causation alone would be too inflexible and would not necessarily result in greater certainty. Retaining the existing criteria would have the advantage that the new regime would build on the present law and the way in which it works. The court would be at liberty to lay down standard reductions to be applied in relation to common acts of contributory negligence where the blameworthiness is likely to be similar in each case. It has already done this in relation to failure to wear a seat belt.[70] In the contractual context it might be harder to establish common standards as blameworthiness will be affected by the parties' rights and duties under the contract.[71]

Accordingly, **we recommend that:**

3. The criteria for apportioning liability specified in the Law Reform (Contributory Negligence) Act 1945 (as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage) should be applicable to the apportionment of damages for breach of a contractual duty to take reasonable care or exercise reasonable skill or both (Clause 1(1) of the Draft Bill).

Contracting out

4.23 We consider that it is essential that the parties to a contract should be able to apportion the risk of loss caused by the plaintiff's contributory negligence as they think fit.[72] In the commercial context it is vital that the parties are able to allocate risk with certainty. The justification for the rule of apportionment applies only where the parties

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[66] Thus Fleming concludes that culpability is measured by the degree of departure from the standard exacted by the law rather than moral blameworthiness: Fleming, *The Law of Torts* (9th ed., 1992) at 300. See also *Pennington* v. *Norris* (1956) 96 C.L.R. 10, 16.

[67] See paras. 3.23 - 24, 3.32, and 3.33, above; *Winfield & Jolowicz on Tort* (13th ed., 1989), p. 166.

[68] See recommendation 1, para. 4.15, above.

[69] See, for example, *Froom* v. *Butcher* [1976] Q.B. 286, 296: "This question should not be prolonged by an expensive enquiry into the degree of blameworthiness on either side, which would be hotly disputed." Burrows suggests that this problem could be avoided by restricting to a few fixed percentages (e.g. 25%, 50%, and 75%) the possible reduction in damages for contributory negligence in contract other than where there is concurrent liability in tort: Burrows, "Contributory Negligence in Contract: Ammunition for the Law Commission" (1993) 109 L.Q.R. 175, 177. However, we believe that creating different rules for cases of concurrent liability would, in itself, lead to disputes.

[70] *Froom* v. *Butcher* [1976] Q.B. 286.

[71] This will be less of an obstacle where industry wide standard terms and conditions are used.

[72] See also, para. 3.7, above.

have not made any contractual provision as to who should bear the loss.[73] Where the parties have agreed that one of them should bear the entire risk of loss, it is not unfair for that party to do so. We have, therefore, decided that the parties to a contract should be able to contract out of the defence of contributory negligence. Most respondents to the consultation paper agreed with this, and it was suggested that, in many cases, particularly in the standard forms used by the construction industry, it would become usual to do so.[74]

4.24 This raises the question whether the "reasonableness" safeguard introduced by the Unfair Contract Terms Act 1977 ("UCTA") will apply to a contractual term which purports to exclude the defence of contributory negligence. We consider that it would not. In the present context UCTA applies to terms which purport to exclude or restrict liability in respect of the breach of contract of the person relying on the clause.[75] In principle, if the defence is excluded, there will be a reversion to the position at common law whereby the plaintiff's contributory negligence is not a defence in whole or in part to an action for breach of contract.[76] The inclusion of such a term in a contract will, therefore, have the effect of increasing the defendant's liability. In relation to the restriction of the plaintiff's responsibility for his contributorily negligent act, UCTA is only relevant if the plaintiff's act in itself constituted a breach of contract.[77] Even then it is doubtful whether the plaintiff is excluding "liability" for his own breach of contract. He is merely excluding a defence which would otherwise be open to the defendant in relation to his breach of contract. The exclusion of the defence would not prevent the defendant from counterclaiming in respect of the plaintiff's breach.

4.25 The Directive on Unfair Contract Terms in Consumer Contracts,[78] which must be implemented by Member States of the European Community by 31 December 1994, requires Member States to provide by national legislation that unfair terms used in a contract concluded with a consumer by a seller or supplier shall not be binding on the consumer.[79] A term is unfair if it has not been individually negotiated and if "contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".[80] This could catch a term which excluded the defence of contributory negligence in actions by the seller against the consumer.

Accordingly, **we recommend that:**

4. The parties to a contract should be able to exclude, expressly or by implication, the defence of contributory negligence (Clause 1(2) of the Draft Bill).

Liquidated damages

4.26 The parties to a contract may agree that a fixed sum is payable in the event of a particular breach of contract. Where the sum is a genuine pre-estimate of the damage that would probably arise from the breach it will be classified as liquidated damages and recoverable in the event of breach without proof of the actual loss suffered.[81]

4.27 A liquidated damages clause is usually incorporated in the contract because the parties want to avoid the difficulty of proving the extent of actual damage at the trial.[82] Although it may be clear that the defendant's breach of contract has caused damage,

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[73] See Working Paper No. 114, para. 4.33.
[74] See para. 3.51, n. 126, above.
[75] S. 3(2)(a), see extended definition in s. 13; s. 2(1) and (2) (breach of obligation arising from express or implied term to take reasonable care or exercise reasonable skill in the performance of the contract).
[76] See para. 2.6, above.
[77] UCTA s. 3(2)(a).
[78] Council Directive 93/13/EEC (OJ L95, 21.4.93, p. 29).
[79] Art. 6.
[80] Art. 3.
[81] *McGregor on Damages* (15th ed., 1988), paras. 442, 445; *Clydebank Engineering and Shipbilding Co. Ltd.* v. *Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co.* [1915] A.C. 79. See also R.S.C. Ord. 6, 6/2/4.
[82] *McGregor on Damages* (15th ed., 1988), para. 442.

proof of its extent may be "extremely complex, difficult and expensive".[83] A liquidated damages provision helps to avoid protracted litigation and may result in a considerable saving of costs.[84] If liquidated damages were subject to apportionment the purpose of achieving simplicity and reducing costs would be defeated. It would not be sufficient to show merely that the defendant's breach caused damage; comparative causation and blameworthiness would have to be considered.[85] To some extent liquidated damages clauses represent an agreed allocation of risk between plaintiff and defendant. The plaintiff bears the risk that his actual damage will be more than the fixed sum, and the defendant bears the risk that it will be less. As we have already made clear,[86] the proposed reform ought not to affect the parties' right to allocate the risk of breach as they think fit. We therefore consider that liquidated damages should not be subject to a reduction on the ground of the plaintiff's contributory negligence. However, where the sum specified in the contract is not a genuine pre-estimate of loss and constitutes a penalty rather than liquidated damages, the plaintiff will be compensated only for his actual loss[87] and apportionment will be available.

Accordingly, **we recommend that:**

5. Where a contract specifies that a sum shall be payable in the event of breach and that sum constitutes liquidated damages, it shall not be subject to a reduction on the ground of the plaintiff's contributory negligence (Clause 1(2) of the Draft Bill).

The plaintiff's conduct before entering into the contract

4.28 We consider that the plaintiff's damages should not be reduced on the ground of contributory negligence where his contributory conduct took place prior to the time when he entered into the contract. There should be no possibility, for example, that a plaintiff's damages could be reduced because he had failed to take reasonable care in selecting the other party to the contract.

Accordingly, **we recommend that:**

6. In deciding whether the plaintiff's damages should be reduced on the ground of contributory negligence the court should be directed to disregard anything done or omitted by him before the contract was entered into (Clause 1(3)(a) of the Draft Bill).

Legislative provision as to the factors which the court should take into account when deciding whether the plaintiff's damages are to be reduced

4.29 The New Zealand Law Commission said, in the context of reform of the law relating to contributory negligence in contract, that "[d]etailed rules about the matters which a court should take into account would not . . . be very helpful. They would be difficult to draft and it would be unlikely that every contingency would be covered."[88] We agree. If an incomplete list of factors is set out there is a risk that the *expressio unius est exclusio alterius*[89] principle of statutory construction will result in it being construed as excluding others.[90] Although this problem could be avoided by careful drafting, we do not in general believe that it is necessary[91] or desirable to specify what the court should take into account in determining whether the plaintiff's damages should be reduced on the ground of contributory negligence. The only exception to this principle is that the court should be required to consider the nature of the contract and the mutual obligations of the parties. We were initially attracted to directing the court to consider all the terms of the contract. However, we decided in the end that although it is essential

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[83] *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Don Jose Ramos Yzquierdo y Castaneda* [1905] A.C. 6, 11.
[84] May, *Keating on Building Contracts* (5th ed., 1991), p. 222; Burrows, *Remedies for Torts and Breach of Contract* (1987), p. 288.
[85] See paras. 4.18 - 4.22, above.
[86] Paras. 3.7 and 4.23.
[87] *Jobson* v. *Johnson* [1989] 1 W.L.R. 1026, 1040. See generally *Chitty on Contracts, Vol I, General Principles* (26th ed., 1989), p. 1171.
[88] New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability* (March 1992) para. 191.
[89] 'To express one thing is impliedly to exclude another'.
[90] Bennion, *Statutory Interpretation* (2nd ed., 1992), p. 873.
[91] See paras. 3.46 - 47, above.

that the court should have regard to the obligations of the parties under the contract, the nature of the contract is also important. Consideration of the nature of a contract, for example, that it is for the provision of financial services, that it is a banking or construction contract, or that it is between professionals, or involves a consumer, will help to indicate whether it was reasonable for the plaintiff to rely on the defendant.[92] Such matters are already relevant as part of the factual matrix against which contracts are construed.[93] The court will, therefore, take into account the question whether one party had special knowledge or skill as compared with the other.[94] Consideration of the nature of the contract will not result in the parties' intention being circumvented because the direction to the court that it also must consider the mutual obligations of the parties will ensure that it will give effect to agreed allocations of risk and will not substitute its own judgment for their bargain.[95]

4.30 We conclude, therefore, that in deciding whether the plaintiff's damages should be reduced on account of his contributory negligence, the court should be directed to consider the nature of the contract between the parties and their mutual obligations. However, we have departed from our provisional conclusion that there should be a statutory direction to take into account the extent to which it was reasonable for the plaintiff to rely on the defendant or their respective expertise in the matter.

Accordingly, **we recommend that:**

7. In deciding whether, and if so, to what extent the plaintiff's damages are to be reduced on the ground of contributory negligence, the court should be directed to have regard to the nature of the contract and the mutual obligations of the parties (Clause 1(3)(b) of the Draft Bill).

The form of legislation

4.31 As we have already reported,[96] respondents did not regard the form of legislation as a major issue. We have considered this matter carefully and have come to the conclusion that the scheme of the 1945 Act is inappropriate to actions in contract, and that it is necessary to have a separate statute. The reason for this is that the structure of section 1 of the 1945 Act rests on the abolition of the common law rule that contributory negligence by a plaintiff was an absolute bar to recovery in tort cases.[97] This is the leading proposition in subsection (1) which states that "a claim . . . shall not be defeated by reason of the fault of the person suffering the damage", and it is also reflected in subsections (2) and (5) which refer to damages being (or not being) recoverable by virtue of subsection (1). Paragraph (a) of the proviso to subsection (1) also arises from the function of the Act of abolishing the common law bar. It makes it clear that the defence is abolished only so far as it exists independently of contract (that is, only in relation to the common law rule). Paragraph (b) states that the action for damages now made possible is not to be independent of existing limits on amount. As we have already seen, the common law bar never operated in contract cases.[98] Thus, although the 1945 Act has been applied to actions in contract where there is co-extensive liability in tort,[99] these provisions of the Act are inappropriate to the contractual context.

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[92] See paras. 3.47 and 4.12, n. 35, above.

[93] *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, 1383 - 1384; *Reardon Smith Line Ltd.* v. *Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, 995 - 996 *per* Lord Wilberforce: "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."

[94] See, for example, *Carradine Properties Ltd.* v. *D.J. Freeman & Co.* (1982) 5 Cons. L.J. 267 and (1985) 1 P.N. 41 (the scope of a solicitor's duty said to be broader in relation to an inexperienced client: see para. 4.12 n. 40, above); *Oscar Chess Ltd.* v. *Williams* [1957] 1 W.L.R. 370 (whether a statement was a term of a contract).

[95] See para. 3.7, above.

[96] Para. 3.59, above.

[97] See para. 2.2, above.

[98] See para. 2.6, above.

[99] See para. 2.2, above.

4.32 Our conclusion that it would be inappropriate to implement the proposed reform by amending the 1945 Act, was confirmed by the fact that with the exception of the statutes referred to in clause 2 of our draft Bill, none of the other statutory provisions which refer to the 1945 Act[100] are relevant to contract cases, so that there is no need for them to pick up the proposed new provisions. All that would be required from the scheme of the 1945 Act in the context of actions in contract would be the apportionment rule. We consider that this can best be achieved by a free-standing proposition in separate legislation with its own supporting provisions.

4.33 Although we believe that it is necessary to implement our recommendations by separate legislation, we consider it important for two reasons that this legislation should follow as closely as possible the apportionment provisions contained in the 1945 Act. First, there is a need to avoid, so far as possible,[101] differences in the treatment of cases of concurrent liability in contract and tort according to whether the action is brought in contract or tort. Actions for breach of contract will have to be brought under the new provisions contained in our draft Bill, even where there is co-extensive liability in tort. However an action for breach of a tortious duty which is co-extensive with a contractual duty of reasonable care will still be brought under the 1945 Act. Second, we wish to ensure that the valuable precedents which illustrate the behaviour that may constitute contributory negligence on the part of the plaintiff (that is, failure to take reasonable care for the protection of himself or his interests)[102] under the 1945 Act,[103] may, where appropriate,[104] be used under the new Act. To this end, the draft Bill uses the same wording with regard to the apportionment of the plaintiff's damages as is used in section 1(l) of the 1945 Act,[105] and provides that the court shall, in deciding whether, and if so, to what extent the plaintiff's damages should be reduced, apply the same principles as those applicable under section 1(1) of the 1945 Act.[106] It also imports the definitions of "court" and "damage" from the 1945 Act.[107]

Accordingly, **we recommend that:**

8. Our recommendations should be implemented by means of separate legislation rather than by amendment of the Law Reform (Contributory Negligence) Act 1945.

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[100] Water Resources Act 1991, ss. 208, 209; Coal Mining Subsidence Act 1991, ss. 31, 32; Environmental Protection Act 1990, s. 73; Consumer Protection Act 1987, s. 6; Merchant Shipping Act 1979, Sch. 3, Pt. II; Control of Pollution Act 1974, s. 88; Merchant Shipping (Oil Pollution) Act 1971, s. 1; Animals Act 1971, ss. 10, 11; Greater London Council (General Powers) Act 1969, s. 25C; Gas Act 1965, s. 14; Carriage by Air Act 1961, s. 6; Hovercraft (Civil Liability) Order 1986 (S.I. 1986 No. 1305), Sch. 4; Merchant Shipping Act 1979 (Isle of Man) Order 1980 (S.I. 1980 No. 1526), Sch.; Merchant Shipping Act 1979 (Pitcairn) Order 1980 (S.I. 1980 No. 1516), Sch; Merchant Shipping Act 1979 (Falkland Islands) Order 1980 (S.I. 1980 No. 1513), Sch.; Merchant Shipping (Oil Pollution) (Soloman Islands) Order 1975 (S.I. 1975 No. 2173), Sch. 1; Merchant Shipping (Oil Pollution) (Falkland Islands) Order 1975 (S.I. 1975 No. 2167), Sch. 1; Government Oil Pipe-Lines (No. 2) Regulations 1959 (S.I. 1959 No. 724), s. 4; Government Oil Pipe-Lines Regulations 1959 (S.I. 1959 No. 715) s. 5.

[101] As our draft Bill provides in clause 1(3) that the court shall disregard anything done or omitted by the plaintiff before the contract was entered into, and that the court shall have regard to the nature of the contract and the mutual obligations of the parties, its apportionment provisions are not completely identical to those in the 1945 Act. However, although the court is not specifically directed to take these matters into account under the 1945 Act, the 1945 Act was not framed with contract law in mind, and we would expect a court to take them into account in an action in tort where there was co-extensive liability in contract.

[102] See the draft Bill clause 1(1)(b).

[103] These were discussed in Part II of the consultation paper. See, especially, *Froom* v. *Butcher* [1976] Q.B. 286, 291; *JEB Fasteners Ltd.* v. *Marks, Bloom & Co.* [1981] 3 All E.R. 289, 297, aff'd. [1983] 1 All E.R. 583; *Bank of Nova Scotia* v. *Hellenic Mutual War Risks Association (Bermuda) Ltd. ("The Good Luck")* [1990] 1 Q.B. 818, 903 - 904 (C.A.), aff'd [1992] 1 A. C. 233, 266 (H.L.). See also the South Australian case, *Walker* v. *Hungerfords* (1987) 44 S.A.S.R. 532, aff'd. (1988) 84 A.L.R. 119.

[104] The risk that the court will follow authorities under the 1945 Act in contractual contexts in which they are inappropriate will be avoided, first, because the cases where this danger would be greatest, of strict liability, are excluded from the reform, and second, because the court is directed to consider the nature of the contract and the mutual obligations of the parties (draft Bill clause 1(3)(b), recommendation 7, paras. 4.29 - 30, above).

[105] Clause 1(1).

[106] Save that the court shall also disregard anything done or omitted by the plaintiff before the contract was entered into, and shall have regard to the nature of the contract and the mutual obligations of the parties: clause 1(3).

[107] Clause 1(6) (although the words "or before" have been removed from the definition of court since they relate to trials by jury and are not relevant to actions in contract).

Record of reduction in the plaintiffs damages

4.34 We consider that, where a plaintiff's damages are reduced on the ground of contributory negligence, the court should be directed to find and record what the damages would have been without the reduction. If a case goes to appeal on quantum, this record will enable the parties to ascertain the arithmetic involved in the court's decision. The 1945 Act makes such provision in section 1(2).

Accordingly, **we recommend that:**

9. Where the plaintiff's damages are reduced on the ground of contributory negligence, the court should be directed to find and record what the damages would have been without the reduction (Clause 1(4) of the Draft Bill).

Assignments

4.35 In some contexts it is not unusual for one or both of the parties to a contract to assign his interest under the contract to a third party. A common example is that of a tenant assigning his interest under a lease to the purchaser of his flat.[108] Another is that of a company taking an assignment of another company's on-going contracts in the course of purchasing the business of that company. It is not necessary to set out here the rules which govern the passing of the benefit and burden of contractual duties on assignment.[109] It suffices to say that it would be anomalous if the defence of contributory negligence was available in an action between the original parties to a contract for breach of a duty arising under the contract, but not in an action for breach of the same duty where one or both of the parties to the action was an assignee. We, therefore, consider that where the assignee of an interest under a contract becomes subject to, or entitled to the performance of, a contractual duty to take reasonable care or exercise reasonable skill, or both, the defence of contributory negligence should be available in an action brought by or against the assignee for breach of that duty. The position should be the same where a person becomes subject to, or entitled to the performance of, such a contractual duty by some other means, for example, by the vesting in him in his capacity as personal representative of the property of a deceased under section 1(1) of the Administration of Estates Act 1925.

Accordingly, **we recommend that:**

10. The defence of contributory negligence should be available in actions by or against a person who has become subject to, or entitled to the performance of, a contractual duty to take reasonable care or exercise reasonable skill or both, by virtue of assignment or otherwise (Clause 1(5) of the Draft Bill).

Consequential ammendments

4.36 Section 4(3) of the Crown Proceedings Act 1947 (application of law as to contributory negligence to the Crown) provides that the 1945 Act shall bind the Crown. It should be amended to state that the legislation recommended in this report shall also bind the Crown.

4.37 Section 5 of the Fatal Accidents Act 1976 provides that where any person dies as the result partly of his own fault and partly of the fault of any other person, the damages under the Act shall be reduced if the 1945 Act would have reduced the damages recoverable in an action brought for the benefit of the deceased's estate. The proposals which we recommend could be relevant to a claim under the 1976 Act, for example, if a private patient died as the result of the lack of care of a surgeon employed by him. We conclude that section 5 of the 1976 Act should also be amended to refer to the proposed statute on contributory negligence in contract.

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[108] It should be noted that in Landlord and Tenant Law: Privity of Contract and Estate (1988), Law Com. No. 174 the Law Commission recommended the abolition of the continuing liability of original landlords and tenants after they have assigned their interest in the property. The Lord Chancellor announced on 31 March 1993 that the Government had decided to implement this recommendation for future leases.

[109] For these see Megarry and Wade, *The Law of Real Property* (5th ed., 1984), pp. 743 – 756, 759 – 60; Treitel, *The Law of Contract* (8th ed., 1989), pp. 604 – 6.

4.38 Section 2(3)(b) of the Civil Liability (Contribution) Act 1978 places a limit on the liability of a person from whom a contribution is sought under the Act, of the maximum amount of that person's liability to the plaintiff, after any reduction on the ground of the plaintiff's contributory negligence by virtue of the 1945 Act. As the 1978 Act applies whatever the legal basis of liability, and is not restricted to actions in tort,[110] it is necessary to amend section 2(3)(b) to refer to the legislation recommended in this report.[111]

Accordingly, **we recommend that:**

11. Section 4(3) of the Crown Proceedings Act 1947, section 5 of the Fatal Accidents Act 1976, and section 2(3)(b) of the Civil Liability (Contribution) Act 1978 should be amended to refer to the Contributory Negligence Act 1993 (Clause 2 of the Draft Bill).

Savings

4.39 The proposed reform should, in our opinion, affect only those contracts which are entered into after it comes into effect. The parties to a contract entered into before this date could, had they considered it appropriate, have provided that the plaintiff's damages should be reduced in the event of his contributory negligence. If, however, apportionment is imposed on the parties to such a contract retrospectively, they will not have had the opportunity which will be open to those entering into new contracts, to exclude apportionment in the terms of their contract. Automatic apportionment would be an unwarranted interference with their contractual rights.

Accordingly, **we recommend that:**

12. The reform should not apply to any contract entered into before it comes into effect (Clause 3(3) of the Draft Bill).

[110] S. 1(1).

[111] Paras. 5.6 – 9, below explain how the 1978 Act will apply in relation to contributory negligence in actions in contract.

PART V

SUBSIDIARY MATTERS RELATING TO THE RECOMMENDATIONS

5.1 In this part we consider certain subsidiary matters which relate to our recommendation that apportionment should be available where there is liability for breach of a contractual duty to take reasonable care or exercise reasonable skill or both. We examine the application of the doctrine of imputed contributory negligence,[1] the availability of apportionment in relation to intentional breaches of contract,[2] the effect of apportionment where there are multiple defendants,[3] the effect of the recommended reform on the innocent party's right to keep the contract alive after it has been repudiated by the defendant,[4] the effect of the reform on guarantees and indemnities,[5] the question whether our recommendations are in line with recent developments in the law of the European Community,[6] and the implications of our recommendations in particular contexts (banking, insurance, construction, accountancy, consumer contracts, employment, landlord and tenant, and standard form contracts).[7]

Imputed contributory negligence

5.2 Although the policy considerations which underpin the rules governing vicarious liability do not necessarily apply where it is sought to impute the contributory negligence of another to a plaintiff,[8] on balance we consider that it is correct to have 'vicarious' responsibility for contributory negligence. An example which has often been given as a justification for imputed contributory negligence is the possibility of a lorry driver's employer being held liable to third parties for his driver's negligence, but nonetheless being entitled to recover full damages for damage to the lorry from a negligent defendant.[9] An example in a contractual context is the case of *AWA Ltd.* v. *Daniels*[10] where a plaintiff company suffered loss as the result of the negligence of its auditors (who were liable concurrently in contract and tort), but "much of the damage [lay] at the door of senior management of the plaintiff". In those circumstances the court said that there was "every economic reason for identifying the plaintiff corporation with the negligent acts of its senior management".[11]

5.3 As we have explained in paragraph 2.4 above, the contributorily negligent act of another person will be imputed to the plaintiff in any circumstances in which he would have been vicariously liable for that person's act had it caused damage to a third person. There is, therefore, no need to make specific provision for imputed contributory negligence in the draft Bill.[12] We gave some examples of how imputed contributory negligence would operate in paragraph 4.15 (2) and (3), above.[13]

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[1] Paras. 5.2 - 3, below.
[2] Paras. 5.4 - 5, below.
[3] Paras. 5.6 - 9, below.
[4] Paras. 5.10 - 13, below.
[5] Paras. 5.14 - 15, below.
[6] Paras. 5.16 - 18, below.
[7] Paras. 5.19 - 29, below.
[8] The 'solvent defendant'justification that the employer is in the best position to compensate the plaintiff and can insure against the negligence of his employees does not apply to the contributory negligence situation: see the discussion in *AWA Ltd.* v. *Daniels* (1992) 7 A.C.S.R. 759, 851 - 3 and Atiyah, *Vicarious Liability in the Law of Torts* (1969), p. 409. Cf. the justifications (i) that imputed contributory negligence acts as an incentive on the employer to introduce safety procedures: *Hutchinson* v. *London & North Eastern Railway Co.* [1942] 1 K.B. 481, 488; Atiyah *ibid.* p. 16; and (ii) that the employer should bear the risk the activity of his employees creates where he gains the benefit that activity produces: *Imperial Chemical Industries Ltd.* v. *Shatwell* [1965] A.C. 656, 685; Rogers, *Winfield & Jolowicz on Tort* (13th ed., 1989) pp. 588 - 9.
[9] See, for example, Atiyah, *Vicarious Liability in the law of Torts* (1969), p. 410; Scot. Law Com. No. 115, *Report on Civil Liability - Contribution* (December 1988), para. 4.30.
[10] (1992) 7 A.C.S.R. 759, 852.
[11] *Ibid.*
[12] It might be thought that, in the context of new legislation, the opportunity should have been taken to specify exactly when contributory negligence will be imputed to a plaintiff, rather than relying on the vagaries of the law relating to vicarious liability. However, we do not believe that reform of the law relating to contributory negligence in contract is the appropriate vehicle for resolving these uncertainties. All we wish to achieve is that the rules on imputed contributory negligence under the 1945 Act apply also where the defendant is in breach of a contractual duty of reasonable care. This will be the position in any event, and there is accordingly no need for a special provision in the draft Bill to this effect.
[13] See also paras. 3.50 - 51 and 4.12 - 13, above re. imputation in the context of construction.

Intentional breaches of contract

5.4 In the consultation paper we provisionally concluded that apportionment should be available in cases of intentional breach of contract (by which is meant a breach committed cynically or knowingly in order to make a gain).[14] This point attracted virtually no comment from respondents which may mean that, in general, they agree with our provisional view and that they do not regard deliberate breach as a particular problem.

5.5 We still hold our provisional view that apportionment should be available where there is an intentional breach of contract. As stated in the consultation paper,[15] the law does not usually distinguish between intentional and unintentional breaches of contract. Many breaches of contract are deliberate in the sense that they are made for commercial reasons and we consider that apportionment should not be excluded where an intentional breach causes unintentional harm. A distinction between intentional breaches causing intentional harm and those causing unintentional harm would cause evidential difficulties. It would be very hard to show that the defendant had the necessary intent.[16] In any event, we do not consider that it is necessary to exclude the defence in cases of deliberate breach. This is because, if a breach of contract was committed flagrantly by the defendant to enhance his profit, the court would, when exercising its discretion to apportion damages, take that fact into account.[17] In conclusion, we believe that the exclusion of the defence of contributory negligence in cases of deliberate breach of contract is not necessary in the interests of justice and that it could result in costly and extensive enquiries into the defendant's intention. We have not, therefore, recommended that the defence of contributory negligence should be excluded where a defendant is liable for intentional breach of a contractual duty of reasonable care.

The effect of apportionment where there are multiple defendants

5.6 We will now consider the effect of a rule of apportionment in contract on contribution claims between defendants in a situation where there are several defendants of whom some can, but some cannot, claim apportionment on the basis of the plaintiff's contributory negligence. This issue can already arise under the present law, if, for example, a plaintiff's damage is caused by both a manufacturer's negligence and a supplier's breach of strict contractual duty. We do not envisage that the extension of contributory negligence to all cases involving liability for breach of a contractual duty to take reasonable care or exercise reasonable skill will create any new problems. The position will be as set out below.

5.7 In the discussion that follows we have assumed that the plaintiff ("P") has been contributorily negligent and that apportionment is available to one defendant ("D1") but not to the other ("D2"). If P sues D1, his damages will be reduced on the ground of his contributory negligence. D1 can seek a contribution to the reduced amount which he has to pay from D2.[18] D2 will be ordered to contribute such amount as the court finds "just and equitable having regard to [D2's] responsibility for the damage in question."[19]

5.8 If P sues D2, he will recover full damages. D2 can seek a contribution from D1.[20] D1's contribution will be assessed on the same basis as that of D2 in paragraph 5.7,

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[14] Working Paper No. 114, para. 4.41.

[15] *Ibid.*

[16] However, the Scottish Law Commission recommended that the defence of contributory negligence be excluded where there is "a deliberate act or omission intended to cause [the plaintiff] to suffer loss": Scot. Law Com. No. 115, *Report on Civil Liability - Contribution* (December 1988), clause 9(1). Cf. the Ontario Law Reform Commission which did not recommend excluding the defence in cases of deliberate breach: Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988), p. 248.

[17] The court will take into account the 'blameworthiness' of the parties when deciding what is just and equitable: see recommendation 3, paras. 4.20 - 22, above.

[18] Civil Liability (Contribution) Act 1978 ("the CLCA") s. 1. D1 may bring third party proceedings against D2: R.S.C. Ord. 16, r. 1(1)(a).

[19] CLCA s. 2(1).

[20] CLCA s. 1.

above, but will be subject to a maximum of the reduced sum for which he would be liable on account of P's contributory negligence.[21]

5.9 If P takes action against both D1 and D2, the court will look at the matter in two stages. First, it will determine the liability of each defendant to P. (If the defence of contributory negligence were available to both defendants, this would be a single exercise. P's contributory conduct would be contrasted with the totality of the defendants' conduct). Second, it will assess the contributions of D1 and D2 inter se.[22]

Repudiation

5.10 In general, there is no obligation on an innocent party who is confronted with conduct constituting a repudiation of the contract by the other party to accept the repudiation and sue for damages rather than keep the contract alive.[23] Where a defendant repudiates an obligation to exercise reasonable care and skill the introduction of the proposed reform might be thought to affect the plaintiff's right to keep the contract alive. This might occur if it was held that the plaintiff's refusal to accept the repudiation was unreasonable.[24] For the reasons set out below, we do not, however, believe that this would represent a significant change in the law.

5.11 Where there is an *actual* breach of contract the plaintiff will be under a duty to mitigate.[25] It is unlikely that action which is considered reasonable for the purpose of the duty to mitigate would be considered unreasonable in the context of contributory negligence.

5.12 Where the breach is anticipatory, a power to apportion for contributory negligence would only give rise to differences where the plaintiff has a legitimate interest in continuing performance.[26] If, where there is a legitimate interest, the plaintiff completes his performance, there will very rarely be a problem since in most cases[27] he will sue in debt and contributory negligence will not apply.[28] If, however, he is unable to complete his performance, has simply exercised his right to wait until the defendant's performance is due, or has completed his performance but the defendant's obligation is something other than the payment of money, his claim will be in damages and the possibility of a reduction for contributory negligence will arise. He may in theory be worse off than under the present law because the duty to mitigate arises only when the plaintiff knows of his loss or of the defendant's wrongful act.[29] This would be the position only if the plaintiff had a "legitimate" interest in performing or in waiting until the defendant's performance fell due, but in so doing was considered to have acted unreasonably and contributed to his own loss.[30] We think it is very unlikely indeed that a person with a legitimate interest in performing would be considered to have acted unreasonably in doing so, particularly in view of the narrow interpretation subsequent

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[21] CLCA 1978 s. 2(3)(b). See para. 4.38, recommendation 10, above and clause 2 of the Draft Bill.

[22] *Fitzgerald* v. *Lane* [19891 A.C. 328. In New Zealand Law Commission Preliminary Paper No. 19, *Apportionment of Civil Liability - A Discussion Paper* (March 1992), paras. 125 - 6, 195, the New Zealand Law Commission interprets this case as holding that the assessment of the plaintiffs share in responsibility for his loss does not involve the determination of the extent of the individual culpability of each defendant. Thus it states that the plaintiff's share in responsibility should be fixed as against all the defendants, even if the defence of contributory negligence is not available to one defendant. However, in that case the defence of contributory negligence was available to each defendant. We do not consider that the same rule applies where the defence is not available to one defendant.

[23] *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413; Treitel, *The Law of Contract,* (8th ed., 1991), p. 754. See Working Paper No. 114, paras. 4.16, 4.31.

[24] A plaintiff is contributorily negligent if he fails to take reasonable care for the protection of himself or his interests: recommendation 2, para. 4.17, above, and clause 1(1)(b) of the Draft Bill.

[25] On mitigation see paras. 3.19 - 3.21, above.

[26] If the plaintiff has no legitimate interest in treating the contract as subsisting he can only claim damages: *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413, 431, *per* Lord Reid; *Attica Sea Carriers Corpn.* v. *Ferrostaal Poseidon Bulk Reederei G.m.b.H.* [1976] 1 Lloyd's Rep. 250; *The Alaskan Trader* [1984] 1 All E.R. 129.

[27] Where the defendant's performance is something other than the payment of a sum of money the plaintiff will usually be unable to complete his performance without the co-operation of the defendant.

[28] The obligation to pay a debt is strict and will not be affected by the recommended reform.

[29] See para. 3.20, above.

[30] There may be a difference between what is reasonable and what constitutes a legitimate interest: *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413, 431; *Telephone Rentals Plc* v. *Burges Salmon & Co. The Independent* 22 April 1987.

courts have placed on the *White & Carter* v. *McGregor* rule.[31] In any event, an anticipatory repudiation of the contract would involve a repudiation not only of contractual duties to take reasonable care but also of strict contractual duties to which the apportionment regime would not apply.[32]

5.13 We conclude that the proposed reform will not, in practice, affect the right of the innocent party to keep the contract alive after a repudiation, and that there is no need for a special provision to protect this right.

Guarantees and indemnities

5.14 A contract of guarantee is a contract by which the guarantor agrees to answer for all or part of the liability of another person to the contractor.[33] The amount payable under a guarantee will sometimes be recoverable from the guarantor by way of damages for breach of the contract of guarantee, and sometimes as a debt.[34] Apportionment will not apply to actions on a guarantee, whether in debt or damages. The contractual duty that is broken by the guarantor is to ensure that the debtor performs his obligations to the creditor.[35] This duty is strict and, therefore, outside the scope of our proposals.[36]

5.15 A contract of indemnity is a contract by which one party agrees to make good a loss suffered by another. In its widest sense it includes most contracts of insurance and contracts of guarantee.[37] An action on a contract of indemnity will sometimes be brought in debt and sometimes in damages.[38] Again, whether the action is brought in debt or damages, contractual indemnities will not be affected by the proposed reform because the duty to indemnify is strict.

Contributory negligence and European Community law

5.16 The European Community is becoming increasingly involved in the regulation of consumer contracts. The introduction of the defence of contributory negligence in relation to contractual duties to exercise reasonable care may, in some circumstances, reduce the liability of a provider of goods or services towards a consumer. We therefore consider it necessary to ensure that the proposed reform is not incompatible with recent developments in the laws of the European Community.

5.17 In some areas the European Community has legislated for the situation where a plaintiff is contributorily negligent. The Directive on Package Travel[39] imposes a form of strict liability on providers of package holidays for damage caused to the consumer. However, it is a defence to show that neither the provider nor his contractor were at fault and the breach of contract was attributable to the consumer.[40] Similarly, under a proposal for a Directive on Liability of Suppliers of Services,[41] the liability of

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[31] *Attica Sea Carriers Corpn.* v. *Ferrostaal Poseidon Bulk Reederei G.m.b.H.* [1976] 1 Lloyd's Rep. 250; *The Alaskan Trader* [1984] 1 All E.R. 129; Burrows, *Remedies for Torts and Breach of Contract* (1987), pp. 281 - 2.

[32] See para. 4.1, above.

[33] *Chitty on Contracts - Specific Contracts, Volume II* (26th ed., 1989), para. 5010. See generally *Rowlatt on Principal and Surety* (5th ed., 1991), ch. 1.

[34] *Moschi* v. *Lep Air Services Ltd.* [1973] A.C. 331, 349, *per* Lord Diplock. It is a matter of construction whether the guarantee puts the guarantor under a duty to pay the amount should the debtor default, or under a duty to see that the debtor pays, breach of which sounds in damages. Both types of guarantee can exist in the same contract: *Hyundai Heavy Industries Co.* v. *Papadopoulos* [1980] 1 W.L.R. 1129, 1151 *per* Lord Fraser of Tullybelton.

[35] *Moschi* v. *Lep Air Services Ltd.* [1973] A.C. 331, 349.

[36] See para. 4.1, above.

[37] *Halsbury's Laws of England* (4th ed., 1978), vol. 20, para. 305. In its narrow sense it may be contrasted with a contract of guarantee as the promisor undertakes an original and independent obligation to indemnify, as distinct from a collateral contract by which the promisor undertakes to answer for the default of another person who is primarily liable to the promisee. See also *Chitty on Contracts – Specific Contracts, Volume II* (26th ed., 1989), paras. 5015 - 6.

[38] See *Halsbury, ibid., Chitty on Contracts - Specific Contracts, Volume II* (26th ed., 1989), para. 4264, and the cases cited.

[39] Council Directive 90/314/EEC, (OJ L158, 15.6.90, p. 59), implemented by The Package Travel, Package Holidays and Package Tours Regulations 1992, S.I. 1992, No. 3288.

[40] S.I. 1992, No. 3288, reg. 15(2). There is no provision for apportionment, and if the provider is also at fault he will be liable for the whole damage.

[41] Proposal for a Council Directive on the Liability of Suppliers of Services 1991 (OJ C012).

the supplier of a service can be reduced or disallowed where the damage is caused both by his fault and by that of the injured person.[42] Finally, the Directive on Unfair Contract Terms in Consumer Contracts[43] provides that a term which has not been individually negotiated and "causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" is unfair and not binding on the consumer.[44] This will not affect apportionment for contributory negligence because there is no need to make contractual provision for it.[45]

5.18 We have concluded that the introduction of apportionment for contributory negligence will not be contrary to the current European Community trend towards increased consumer protection. European Community legislation already recognises that consumer fault should be taken into account when assessing a defendant's liability.

Particular contexts

Banking[46]

5.19 In the consultation paper we considered the impact of the defence of contributory negligence in the context of banking.[47] We explained that the customer does not owe, in the absence of an express agreement, any duty to take reasonable precautions to prevent forged cheques being presented to his bank,[48] nor a duty to take reasonable steps to check his bank statements to detect cheques which have not been authorised by him.[49] We also pointed out that the Report of the Review Committee on Banking Services Law,[50] ("the Review Committee") questioned whether it was right that the bank should be wholly liable in respect of forged cheques which it could only have identified by elaborate and expensive enquiries, when a customer could have prevented the fraud by elementary precautions. It recommended that the law should be reformed so that, in an action against a bank in debt or for damages arising from an unauthorised payment, the customer's contributory negligence might be raised as a defence, but only if the court was satisfied that the degree of negligence shown by the customer was sufficiently serious for it to be inequitable that the bank should be liable for the whole amount of the debt or damages.[51]

5.20 Under our recommendations, the customer's contributory negligence could be raised as a defence by a bank where the bank is liable for damages for breach of a contractual duty of care, but not where the bank owed a strict duty to the customer, for example, in an action in debt. Banks are subject to an implied contractual duty to carry out the banking service with reasonable care and skill.[52] The customer's contributory negligence will be relevant where the bank is in breach of that duty. However, for the most part actions against banks concern breach of mandate by the bank, for example, where third party fraud has resulted in an unauthorised payment which the bank has debited against the customer's account.[53] The duty of a bank to adhere to the terms of

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[42] Art. 7(2).

[43] Council Directive 93/13/EEC (OJ L95, 21.4.93, p. 29).

[44] Arts. 3 and 6; see para. 4.25, above.

[45] It might however affect a clause which purported to exclude the defence of contributory negligence in an action by the seller against the consumer: see para. 4.25, above.

[46] N.b. contributory negligence is available as a defence to an action in conversion brought by the true owner of a cheque against the collecting bank "[i]n any circumstances in which proof of absence of negligence on the part of a banker would be a defence in proceedings by reason of section 4 of the Cheques Act 1957": s. 47 Banking Act 1979.

[47] Working Paper No. 114, appendix.

[48] Other than a duty to refrain from drawing a cheque in such a manner as may facilitate fraud and a duty to inform the bank of any forgery of which he has knowledge: Working Paper No. 114, appendix, para. 1.

[49] Working Paper No. 114, appendix, para. 2.

[50] *Banking Services: Law and Practice, Report by the Review Committee* (Chairman, Professor Jack) (1989), Cm. 622, esp. ch. 6.

[51] Working Paper No. 114, appendix, para. 4.

[52] S. 13 Supply of Goods and Services Act 1982; *Lipkin Gorman* v. *Karpnale Ltd.* [1987] 1 W.L.R. 987 (this point was not raised in the House of Lords [1991] 2 A.C. 548). See *Banking Services: Law and Practice, Report by the Review Committee* (Chairman, Professor Jack) (1989), Cm. 622, paras. 6.06 - 6.07.

[53] See, for example, *Tai Hing Cotton Mill Ltd.* v. *Liu Chong Hing Bank Ltd.* [1986] A.C. 80: Working Paper No. 114, appendix, para. 3.

its mandate is strict.[54] Apportionment on the grounds of the customer's contributory negligence will not be available in respect of breach of this duty.

5.21 Our recommendations for reform do not, therefore, deal with the problem identified by the Review Committee. However, as we pointed out in the consultation paper,[55] it is open to banks to stipulate in their contracts, subject to UCTA, that the customer should take reasonable precautions to prevent forged cheques being presented, or to check bank statements. As we have already said,[56] a number of respondents thought that this point was important and suggested that the reason that banks did not do this was fear of losing business in a competitive market. Fears were also expressed that banks were usually in the stronger bargaining position and that, if apportionment were available, they would be encouraged to raise technical defences to valid claims. We consider that these points have some merit, and we see no reason in the context of banking to depart from our conclusion that the defence of contributory negligence should not be available where a defendant is liable for breach of a strict contractual duty.

Insurance

5.22 A contract of insurance is a contract "whereby one party (the insurer) undertakes for a consideration to pay money or provide a corresponding benefit to or for the benefit of the other party (the assured) upon the happening of an event which is uncertain, either as to whether it has or will occur at all, or as to the time of its occurrence, where the object of the assured is to provide against loss or to compensate for prejudice caused by the event, or for his old age (where the event is the reaching of a certain age by the assured) or (where the event is the death of the assured) for the benefit of others upon his death".[57] As we have explained in paragraph 3.55, we remain of the view we expressed in the consultation paper,[58] that apportionment would be inappropriate in a claim under a contract of liability insurance. The proposed reform will not affect an insurer's obligation to pay out under the terms of an insurance policy, since this obligation is strict.[59] It follows that no special provision is required in relation to contracts of insurance.

Construction

5.23 We have already considered the effect of the recommended reform in the context of construction when dealing with chains of contracts,[60] the failure of the owner or his supervisor to check that the contractor carries out his obligations properly,[61] and imputed contributory negligence,[62] and have expressed the view that no particular difficulties will result. We conclude that, although construction projects give rise to complex chains of contracts, apportionment will not give rise to any special problems in this context.[63] If particular problems are envisaged by the parties, it will be open to them to exclude apportionment in the terms of their contract. As we said in paragraph 3.51,[64] one respondent suggested that this will become usual in the standard form contracts used in the construction industry.

Accountancy

5.24 Apportionment on the ground of contributory negligence in contract appears to

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[54] Ellinger, *Modern Banking Law (1987), p. 285; Chitty on Contracts - Specific Contracts Vol. II* (26th ed., 1989), para. 2906.

[55] Working Paper No. 114, appendix, para. 3.

[56] Para. 3.49, above.

[57] *Chitty on Contracts - Specific Contracts Vol. II* (26th ed., 1989), para. 4204. Most contracts of insurance are contracts of indemnity: *ibid.* para. 4205, as to which see para. 5.15, above.

[58] Working Paper No. 114, paras. 2.7, 4.5.

[59] *Medical Defence Union Ltd.* v. *Department of Trade* [1980] Ch. 82, 95; *C.V.G. Siderurgicia del Orinoco S.A.* v. *London Steamship Owners' Mutual Insurance Association Ltd. (The "Vainqueur Jose")* [1979] 1 Lloyd's Rep. 557, 580; Parkington, Legh-Jones, Longmore, Birds, *MacGillivray and Parkington on Insurance Law* (8th ed., 1988), para. 3.

[60] Para. 3.52, above.

[61] Paras. 3.51, 4.12 - 13, 4.15, point 3, above.

[62] Paras. 3.50 and 4.15, point 3, above.

[63] A question was also raised about the contractor's right to payment before and after the issue of the architect's certificate. However, the obligation to pay is strict and will not be affected by our proposals.

[64] N. 129.

be widely supported in the context of accountancy.[65] The Report of the Auditors Study Team on Professional Liability[66] ("the Likierman Report") recommended that the 1945 Act should be amended to make it clear that negligence by a plaintiff is relevant to awards in cases involving breach of contract. Members of the Study Team included users of accountancy services, insurers, and legal experts as well as members of the profession.[67] The Auditing Practices Board notes in its paper on *The Future Development of Auditing,*[68] that this recommendation has not been adopted. It suggests that all the recommendations of the Likierman Report ought to be addressed again, and urgently. We, therefore, envisage that our proposals will be welcomed in relation to accountancy.[69]

Consumer contracts

5.25 We have already discussed the concerns raised by apportionment in relation to consumer contracts.[70] We concluded that the restriction of the defence of contributory negligence to breaches of the contractual duty to take reasonable care or exercise reasonable skill or both would remove from the scope of the reform those cases in which apportionment would be contrary to legal and social policy and in which injustice was most likely to result. In the cases that remain, we considered that it would usually be reasonable for a consumer to rely on a defendant performing his contractual obligations without having to check on his performance, and that the court would take into account the lack of experience of a consumer.[71] The direction to the court to have regard to the nature of the contract in deciding whether and, if so, to what extent the damages recoverable by the plaintiff are to be reduced is a further safeguard for consumers.[72] A consumer should, therefore, be held to be contributorily negligent only where it was very obvious that he had failed to take reasonable care and as a result had contributed to his loss. In such cases, if the defendant had not guaranteed a particular outcome,[73] it is not unfair for the consumer to bear some responsibility for his loss. As we have seen,[74] apportionment is already available in relation to breach of a contractual duty of care where there is concurrent liability for breach of a tortious duty of care. It is noteworthy that no respondent suggested that this was unfair to consumers or that it created problems for them.[75] Indeed, the National Consumer Council said that it saw no reason why apportionment in such cases was wrong either in principle or in practice. We conclude that consumers will not be unfairly prejudiced by the proposed reform, and should not be excluded from its scope.

Employment

5.26 We stated in paragraph 3.54, above, that we did not regard it as anomalous that under the Employment Protection (Consolidation) Act 1978 the Industrial Tribunal must reduce a plaintiff's compensation for unfair dismissal where the plaintiff has caused or contributed to his dismissal, while the plaintiff's damages for wrongful dismissal are not subject to apportionment. The responses on consultation did not convince us that it was necessary to make special provision for employment law.

Landlord and tenant

5.27 As we reported in paragraph 3.56 above, the only concerns which were expressed in the context of landlord and tenant law related to the avoidance of strict duties by either landlord or tenant. Such duties will not be affected by the

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[65] For examples of the type of circumstances in which contributory negligence might arise in the context of accountancy see Marshall and Beltrami, "Contributory Negligence: A Viable Defence For Auditors?" [1990] L.M.C.L.Q. 416, 420 - 7; *AWA Ltd.* v. *Daniels* (1992) 7 A.C.S.R. 759.

[66] *Professional Liability, Report of the Study Teams* (Chairman, Professor Likierman), 1989 H.M.S.O., para. 9.7. See Working Paper No. 114, para. 1.3.

[67] *Ibid.,* Steering Group Report, para. 1.1; Report of the Auditors Study Team, Appendix 2.

[68] *The Future Development of Auditing: A Paper to Promote Public Debate* (Nov. 1992), The Auditing Practices Board, para. 5.4.

[69] See also Marshall and Beltrami, "Contributory Negligence: A Viable Defence For Auditors?" [1990] L.M.C.L.Q. 416, 419 - 20, 427.

[70] Paras. 3.35 - 7, 3.40, point 3, above.

[71] Paras. 3.46, 4.11 - 13, 4.29, above.

[72] See recommendation 7, paras. 4.29 - 30, above and clause 1(3) of the draft Bill.

[73] See paras. 3.22, 3.33, above.

[74] Paras. 2.2 and 4.8, above.

[75] See para. 3.57, above.

recommended reform. Although duties to take reasonable care in such contracts will be affected, we do not believe that it is necessary to make specific provision for this context. For instance, our reform would not prejudice tenants suing for breach of the landlord's implied obligation to take reasonable care to keep the means of access to units in a building in multiple occupation in reasonable repair since the tenants, in any event, are under an implied duty under the contract to do what reasonable tenants would do for themselves in using the building.[76]

Standard form contracts

5.28 We have already explained in paragraph 3.58, above, that there is no need to accord special treatment to standard form contracts. We consider it likely that apportionment will be excluded in standard form contracts which are designed to provide an express allocation of risk between the parties.

Conclusion

5.29 We conclude that the proposed reform does not have particular implications in the various contexts which have been drawn to our attention, and that it is not necessary to make special provision for any of them.

[76] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, 256, 258 - 59, 261 - 62.

PART VI

SUMMARY OF RECOMMENDATIONS

6.1 Where a plaintiff suffers damage as the result partly of the breach of a contractual duty to take reasonable care or exercise reasonable skill or both, and partly of his own contributory negligence, the damages recoverable by him in respect of that damage should be subject to a reduction. (Recommendation 1; paragraphs 4.1 - 15; clause 1(1))

6.2 Contributory negligence should be defined as the plaintiff's failure to take reasonable care for the protection of himself or his interests. (Recommendation 2; paragraphs 4.16 - 17; clause 1(1)(b))

6.3 The criteria for apportioning liability specified in the Law Reform (Contributory Negligence) Act 1945 (as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage) should be applicable to the apportionment of damages for breach of a contractual duty to take reasonable care or exercise reasonable skill or both. (Recommendation 3; paragraphs 4.18 - 22; clause 1(1))

6.4 The parties to a contract should be able to exclude, expressly or by implication, the defence of contributory negligence. (Recommendation 4; paragraphs 4.23 - 25; clause 1(2))

6.5 Where a contract specifies that a sum shall be payable in the event of breach and that sum constitutes liquidated damages, it shall not be subject to a reduction on the ground of the plaintiff's contributory negligence. (Recommendation 5; paragraphs 4.26 - 27; clause 1(2))

6.6 In deciding whether the plaintiff's damages should be reduced on the ground of contributory negligence the court should be directed to disregard anything done or omitted by him before the contract was entered into. (Recommendation 6; paragraph 4.28; clause 1(3)(a))

6.7 In deciding whether, and if so, to what extent the plaintiff's damages are to be reduced on the ground of contributory negligence, the court should be directed to have regard to the nature of the contract and the mutual obligations of the parties. (Recommendation 7; paragraphs 4.29 - 30; clause 1(3)(b))

6.8 Our recommendations should be implemented by means of separate legislation rather than by amendment of the Law Reform (Contributory Negligence) Act 1945. (Recommendation 8; paragraphs 4.31 - 33)

6.9 Where the plaintiff's damages are reduced on the ground of contributory negligence, the court should be directed to find and record what the damages would have been without the reduction. (Recommendation 9; paragraph 4.34; clause 1(4))

6.10 The defence of contributory negligence should be available in actions by or against a person who has become subject to, or entitled to the performance of, a contractual duty to take reasonable care or exercise reasonable skill or both, by virtue of assignment or otherwise. (Recommendation 10, paragraph 4.35, clause 1(5))

6.11 Section 4(3) of the Crown Proceedings Act 1947, section 5 of the Fatal Accidents Act 1976, and section 2(3)(b) of the Civil Liability (Contribution) Act 1978 should be amended to refer to the Contributory Negligence Act 1993. (Recommendation 11; paragraphs 4.36 - 38; clause 2)

6.12 The reform should not apply to any contract entered into before it comes into effect. (Recommendation 12; paragraph 4.39; clause 3(3))

(Signed) HENRY BROOKE, *Chairman*
TREVOR M. ALDRIDGE
JACK BEATSON
RICHARD BUXTON
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
8 October 1993

APPENDIX A

Draft
Contributory Negligence Bill

ARRANGEMENT OF CLAUSES

Clause

A

B I L L

TO

Provide for reducing the damages recoverable for breach of a contractual duty to take reasonable care or exercise reasonable skill in cases where the claimant's failure to take reasonable care has contributed to the damage suffered by him. A.D. 1993.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Contributory negligence in claims for breach of contract.

1.—(1) Where by virtue of an express or implied term of a contract a party is under a duty to take reasonable care or exercise reasonable skill or both in the performance of the contract and the party to whom that duty is owed suffers damage as the result—

(a) partly of a breach of that duty; and

(b) partly of his own failure to take reasonable care for the protection of himself or his interests,

the damages recoverable by that party on a claim in respect of the damage shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

(2) Subsection (1) above does not apply if the parties have agreed (in whatever terms and whether expressly or by implication) that the damages for breach of the contract are not to be reduced as there mentioned, for example by specifying a sum payable in the event of breach and constituting liquidated damages.

(3) Where subsection (1) above applies the court, in deciding whether and, if so, to what extent the damages recoverable by the claimant are to be reduced—

(a) shall disregard anything done or omitted by him before the contract was entered into; but

(b) shall have regard to the nature of the contract and the mutual obligations of the parties,

and in other respects shall apply the like principles as those applicable under section 1(1) of the Law Reform (Contributory Negligence) Act 1945. 1945 c.28.

EXPLANATORY NOTES

Clause 1 implements Recommendations 1, 2, 3, 4, 5, 6, 7, 9 and 10.

Subsection (1) implements Recommendations 1, 2 and 3 and the policy discussed in paragraphs 4.1-22 of the report. It provides that a plaintiff's damages for breach of a contractual duty to take reasonable care or exercise reasonable skill (or both) shall be reduced where his contributory negligence contributes to his loss. It adopts the wording of section 1(1)(a) of the Unfair Contract Terms Act 1977. Paragraph (b) defines contributory negligence. The latter part of the subsection sets out the criteria for apportioning liability and follows the wording of the appropriate part of section 1(1) of the Law Reform (Contributory) Negligence Act 1945.

Subsection (2) implements Recommendations 4 and 5 and the policy discussed in paragraphs 4.23-27 of the report. It enables the parties to a contract to exclude the defence of contributory negligence and makes it clear that a genuine liquidated damages clause operates to exclude the defence.

Subsection (3) implements Recommendations 6 and 7 and the policy discussed in paragraphs 4.28-30 of the report. It specifies certain matters which the court must disregard (paragraph (a)), and to which it must have regard (paragraph (b), when deciding whether and to what extent to reduce the plaintiff's damages. The latter part of the subsection ensures that the precedents on when damages may be reduced on the ground of contributory negligence under the 1945 Act will, where appropriate, apply to apportionment under the provisions of the draft Bill (paragraph 4.33 of the report).

(4) Where the damages recoverable by any person are reduced by virtue of subsection (1) above the court shall find and record what the damages would have been without the reduction.

(5) In subsection (1) above references to the party by or to whom the duty under the contract is owed include references to any person subject to, or entitled to the performance of, that duty by virtue of assignment or otherwise.

(6) In this section "the court" means, in relation to any claim, the court or arbitrator by whom the claim falls to be determined and "damage" includes loss of life and personal injury.

Consequential amendments.

1947 c.44.

2.—(1) In section 4(3) of the Crown Proceedings Act 1947 (Crown bound by Law Reform (Contributory Negligence) Act 1945) after "1945" there shall be inserted "and the Contributory Negligence Act 1993".

1945 c.28.
1976 c.30.

(2) In section 5 of the Fatal Accidents Act 1976 (reduction of damages under that Act if Law Reform (Contributory Negligence) Act 1945 would have reduced the damages recoverable in an action brought for the benefit of the deceased's estate) there shall be added at the end "and likewise if the damages in an action so brought would be reduced under section 1(1) of the Contributory Negligence Act 1993".

1978 c.47.

(3) In section 2(3)(b) of the Civil Liability (Contribution) Act 1978 (limit on liability of contributor) after "the Law Reform (Contributory Negligence) Act 1945" there shall be inserted ", the Contributory Negligence Act 1993".

Short title, commencement, saving and extent.

3.—(1) This Act may be cited as the Contributory Negligence Act 1993.

(2) This Act comes into force at the end of the period of two months beginning with the day on which it is passed.

(3) This Act does not apply to any contract entered into before the coming into force of this Act.

(4) This Act does not extend to Scotland or Northern Ireland.

EXPLANATORY NOTES

Subsection (4) is self-explanatory. It implements Recommendation 9 and the policy discussed in paragraph 4.34 of the report.

Subsection (5) implements Recommendation 10 and the policy discussed in paragraph 4.35 of the report. It ensures that apportionment on the ground of contributory negligence will be available in an action for breach of a contractual duty to take reasonable care or exercise reasonable skill or both, where one or both of the parties to the action is an assignee, or is otherwise subject to or entitled to the performance of that duty.

Subsection (6) imports the definitions of "court" and "damage" from section 4 of the 1945 Act, but the phrase "or before" has been removed from the definition of "court" as it relates to trials by jury and is not relevant to actions in contract (paragraph 4.33 of the report).

Clause 2 provides for consequential amendments and implements Recommendation 11 and the policy discussed in paragraphs 4.36-38 of the report.

Clause 3 contains the short title, commencement, savings and extent provisions. It implements Recommendation 12 and the policy discussed in paragraph 4.39 of the report.

APPENDIX B

LAW REFORM (CONTRIBUTORY NEGLIGENCE) ACT 1945

1. Apportionment of liability in case of contributory negligence

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

Provided that –

(a) this subsection shall not operate to defeat any defence arising under a contract;

(b) where any contract or enactment providing for the limitation of liability is applicable to the claim, the amount of damages recoverable by the claimant by virtue of this subsection shall not exceed the maximum limit so applicable.

(2) Where damages are recoverable by any person by virtue of the foregoing subsection subject to such reduction as is therein mentioned, the court shall find and record the total damages which would have been recoverable if the claimant had not been at fault.

(3) (Repealed by the Civil Liability (Contribution) Act 1978, s. 9(2), Sch. 2.)

(4) (Repealed by the Fatal Accidents Act 1976, s. 6(2), Sch. 2.)

(5) Where, in any case to which subsection (1) of this section applies, one of the persons at fault avoids liability to any other such person or his personal representative by pleading the Limitation Act 1939, or any other enactment limiting the time within which proceedings may be taken, he shall not be entitled to recover any damages . . . from that other person or representative by virtue of the said subsection. (The words omitted were repealed by the Civil Liability (Contribution) Act 1978, s. 9(2), Sch. 2.)

(6) Where any case to which subsection (1) of this section applies is tried with a jury, the jury shall determine the total damages which would have been recoverable if the claimant had not been at fault and the extent to which those damages are to be reduced.

(7) (Repealed by the Carriage by Air Act 1961, s. 14(3), Sch. 2.)

2. (Repealed by the National Insurance (Industrial Injuries) Act 1946, s. 89(1), Sch. 9.)

3. Saving for Maritime Conventions Act 1911, and past cases

(1) This Act shall not apply to any claim to which section one of the Maritime Conventions Act 1911 applies and that Act shall have effect as if this Act had not passed.

(2) This Act shall not apply to any case where the acts or omissions giving rise to the claim occurred before the passing of this Act.

4. Interpretation

The following expressions have the meanings hereby respectively assigned to them, that is to say–

"court" means, in relation to any claim, the court or arbitrator by or before whom the claim falls to be determined;

"damage" includes loss of life and personal injury;

. . . . . .

"fault" means negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence;

(The words omitted were repealed by the National Insurance (Industrial Injuries) Act 1946, s. 89(1), Sch. 9, and by the Fatal Accidents Act 1976, s. 6(2), Sch. 2.)

5. (Applies to Scotland only.)

6. Provisions as to Northern Ireland

(1) (Repealed by the Carriage by Air Act 1961, s. 14(3), Sch. 2.)

(2) This Act, . . . shall not extend to Northern Ireland. (The words omitted were repealed by the Carriage by Air Act 1961, s. 14(3), Sch. 2.)

7. Short title and extent

This Act may be cited as the Law Reform (Contributory Negligence) Act 1945.

APPENDIX C

List of individuals and organisations who commented on the Law Commission's Working Paper No. 114, "Contributory Negligence as a Defence in Contract"

Individuals

The Lord Ackner
Sir Thomas Bingham M.R.
Lord Justice Dillon
The Lord Goff of Chieveley
The Lord Griffiths
Lord Justice Hobhouse
The Lord Oliver of Aylmerton
Lord Justice Purchas
Lord Justice Staughton
Lord Justice Steyn
Lord Justice Stuart-Smith
Mr. Justice May
Mr. Justice Schiemann
Judge Bowsher Q.C.
Judge Newey Q.C.
Professor H. Beale
A. Bell
Professor M. Brazier
A.S. Burrows
T.A. Downes
Professor A.M. Dugdale
Professor E.P. Ellinger
Professor J.G. Fleming
T. Hervey
Professor J.A. Jolowicz
Dr F.H. Oditah
C. Rickett
A.M. Shea (Clifford Chance)
Professor Sir John Smith Q.C.
A. Thornton Q.C.
Professor G.H. Treitel
I.D. Wallace Q.C.
P. Watts
B.J. Whitney

Organisations

Architects and Surveyors Institute
Association of British Insurers
Associations of County Councils, District Councils and Metropolitan Authorities
Bar Law Reform Committee
British Retailers Association
Confederation of British Industry
Council of Her Majesty's Circuit Judges
Department of Trade and Industry
Federation of British Electrotechnical and Allied Manufacturers' Associations
The Federation of Civil Engineering Contractors
Finance Houses Association
The General Council of the Bar
The Institute of Chartered Accountants
The Institute of Legal Executives
Institute of Purchasing and Supply
The Institution of Civil Engineers
Keith Urquhart Associates
The Law Society

London Common Law and Commercial Bar Association
McKenna & Co.
National Consumer Council
Office of Fair Trading
The Society of Public Teachers of Law Contract Sub-committee
The Royal Institution of Chartered Surveyors
Travers Smith Braithwaite
Watson, Farley and Williams

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